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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 169.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LUCINDA WANGELIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 13, 1889.

1 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between Lucinda Wangelin, plaintiff, and The Louisville and Nashville Railroad Company and The Southeast and St. Louis Railway Company, defendants, a manifest error hath happened, to the great damage of the Louisville and Nashville Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

2 gether with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of July, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

J. A. JONES, *Clerk.*

(Indorsed:) Filed July 6th, A. D. 1886. J. A. Jones, clerk.

3 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Honorable Samuel H. Treat, district judge of said district, and in the absence of the Honorable Walter Q. Gresham, judge of the seventh judicial circuit, on Wednesday, the seventh day of April, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

J. A. JONES, *Clerk.*

LUCINDA WANGELIN
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE SOUTHEAST AND ST. LOUIS RAILWAY COMPANY. } Trespass.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hun-
4 dred and eighty-three, came said defendant, The Louisville and Nashville Railroad Company, by James M. Hamill, Esq., its attorney, and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois a certified record in the foregoing-entitled cause from the circuit court of St. Clair county, Illinois; which said certified record is in the words and figures following, to wit:

Record from St. Clair Circuit Court.

STATE OF ILLINOIS, } *ss:*
St. Clair County, }

At a regular term of the circuit court within and for the county of St. Clair and State of Illinois, begun and held at the court-house, in the city of Belleville, in said county of St. Clair, on Monday, the 21st day of May, A. D. 1883, it being the third Monday of May, A. D. 1883, according to the act of the General Assembly, by the Hon. Amos Watts, one of the judges of the third judicial circuit of the State of Illinois, of which the said county of St. Clair forms a part, the following proceedings were had, to wit:

Present: Honorable Amos Watts, judge; Frederick Ropiequet, sheriff; Robert D. W. Holder, State's attorney; George H. Stolberg, clerk.

5 Be it remembered that on the 9th day of May, 1883, the following præcipe was filed, to wit:

STATE OF ILLINOIS, } *ss:*
St. Clair County, }

In the Circuit Court. May Term, A. D. 1883.

LUCINDA WANGELIN
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD Company and The Southeast and St. Louis Railway Company. } Trespass; Damages, $6,000.

The clerk will please issue as above, and oblige—

R. A. HALBERT AND
C. W. THOMAS,
Att'ys for Pl'ff.

6 Be it remembered that on the 10th day of May, 1883, the following declaration was filed, to wit:

Declaration.

STATE OF ILLINOIS, } ss:
St. Clair County, }

In the Circuit Court. May Term, A. D. 1883.

Lucinda Wangelin, the plaintiff, by R. A. Halbert and C. W. Thomas, her attorneys, complains of The Louisville and Nashville Railroad Company and Southeast and St. Louis Railway Company, defendants, of a plea of trespass, for that the defendants on, to wit, the 1st day of January, 1879, at, to wit, the county aforesaid, with force and arms broke and entered a certain close of plaintiff, situated in said county and described as follows: Lot number 4 on the assessors' plat of survey 375, as the same is recorded in the recorder's office of said county, in Book C of Plats, at page 345, and then and there unlawfully, forcibly, and wilfully tore up and carried away and converted to defendants' own use a certain railroad switch, then — there being the property of the plaintiff, of the value of one thousand dollars, by means whereof the connection theretofore existing between a certain coal mine of plaintiff in said land and a certain railroad in said county, known as the St. Louis and Southeastern railway, was destroyed, and the said mine, which
7 before that time was of great value, to wit, of the value of five thousand dollars, was thereby rendered wholly valueless and was so ruined and destroyed; and the defendants other wrongs to the plaintiff then and there did, against the peace and dignity of the people of this State and to the damage of the plaintiff of six thousand dollars, and therefore she brings her suit.

R. A. HALBERT AND
C. W. THOMAS,
Pl'ff's Att'ys.

Be it remembered that on the 9th day of May, 1883, the following summons issued, to wit:

Summons.

STATE OF ILLINOIS, } sct:
County of St. Clair, }

The people of the State of Illinois to the sheriff of St. Clair county, Greeting:

We command you to summon the Louisville and Nashville Railroad Company and the Southeast and St. Louis Railway Company, if they can be found in your county, to be and appear in the St. Clair county circuit court on the first day of the next term thereof, to be holden at the court-house, in the city of Belleville, in said county of St. Clair, on the third Monday of May, 1883, then and there to answer unto Lucinda Wangelin of a plea of trespass, to

the plaintiff's damages, as she says, of *of* the sum of six
8 thousand dollars, and not to fail under penalty of what the law directs; and this writ you shall have at our said court, with your return endorsed thereon.

Witness George H. Stolberg, clerk of the circuit court,
[L. S.] and the seal thereof hereunto affixed, at office, this 9th day of May, A. D. one thousand eight hundred and eighty-three.

GEORGE H. STOLBERG, *Clerk.*

Endorsements.

STATE OF ILLINOIS, }
St. Clair County. }

I have duly served the within summons on the within-named Louisville and Nashville Railroad Company by reading and by delivering a true copy of the same to C. C. Johnson, an agent of the within-named Louisville and Nashville Railroad Company, the president of said company not being found in my county, this 9th day of May, 1883, as I am therein commanded.

FRED. ROPIEQUET,
Sheriff of St. Clair County,
By JNO. RAGLAND, *Deputy.*

STATE OF ILLINOIS, }
St. Clair County, } *ss:*

I have duly served the within summons on the within-named Southeast and St. Louis Railway Company by reading and
9 by delivering a true copy thereof to James M. Hamil, an attorney of the within-named Southeast and St. Louis Railway Company, the president of said road not being found in my county, this 9th day of May, 1883.

FRED. ROPIEQUET,
Sheriff of St. Clair County,
By JNO. RAGLAND, *Deputy.*

Be it remembered that on the 24th day of May, 1883, the following plea of Louisville & Nashville R. R. Co. was filed, to wit:

Plea.

STATE OF ILLINOIS, }
St. Clair County, } *ss:*

In the Circuit Court, to the May Term, A. D. 1883.

LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY *et al.* } Trespass.

And the defendant, The Louisville and Nashville Railroad Company, by J. M. Hamill, its attorney, comes and defends the force and injury, when, &c., and says that it is not guilty of the said sup-

posed trespasses above laid to its charge or any or either of them in manner and form as the plaintiff has above thereof complained against it; and of this the defendant, The Louisville and
10 Nashville Railroad Company, puts itself upon the country, etc.

J. M. HAMIL,
Attorney for Louisville and Nashville Railroad Company.

Be it remembered that on the 24th day of May, 1883, the following plea of Southeast and St. Louis R'y Co. was filed, to wit:

Plea.

STATE OF ILLINOIS, } ss:
St. Clair County, }

In the Circuit Court, to the May Term, A. D. 1883.

LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY *et al.* } Trespass.

And the defendant, The Southeast and St. Louis Railway Company, by Wilderman and Hamill, its attorneys, comes and defends the force and injury, when, etc., and says that it is not guilty of the said supposed trespasses above laid to its charge or any or either of them in manner and form as the plaintiff has above thereof complained against it; and of this the defendant, The Southeast and St. Louis Railway Company, puts itself upon the country, etc.

WILDERMAN AND HAMILL,
Attorneys for Southeast and St. Louis Railway Company.

11 Be it remembered that on the 11th day of June, 1883, the following motion to remove cause, &c., was filed, to wit:

Motion to Remove.

STATE OF ILLINOIS, } ss:
St. Clair County, }

In the Circuit Court, to the May Term, A. D. 1883.

LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHEAST AND ST. LOUIS RAILWAY COMPANY.

And now comes The Louisville and Nashville Railroad Company, one of the defendants in the above cause, by J. M. Hamill, its attorney, and moves the court to enter an order removing this cause to the United States circuit court for the southern district of Illinois, in accordance with petition and bond filed in said cause.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY,
By J. M. HAMILL, *Its Attorney.*

Be it remembered that on the 11th day of June, 1883, the following petition was filed, to wit:

Petition of L. & N. R. R. Co. to Remove.

STATE OF ILLINOIS, } ss:
St. Clair County, }

In the Circuit Court, to the May Term, A. D. 1883.

12 LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHEAST AND ST. LOUIS RAILWAY COMPANY.

Petition of the Louisville and Nashville Railroad Company for removal to the circuit court of the United States for the southern district of Illinois to the circuit court of St. Clair county, Illinois.

Your petitioner, The Louisville and Nashville Railroad Company, respectfully shows unto this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said cause is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Kentucky—that is to say, a corporation organized and existing under the laws of the State of Kentucky and having its principal place of business and principal office in the State of Kentucky—and that petitioner was not at the commencement of this suit and is not now a citizen of the State of Illinois, and that the Southeast and St. Louis Railway Company was at the commencement of this State [suit] and still is
13 a citizen of the State of Illinois—that is to say, a corporation organized and existing under the laws of the State of Illinois; that the plaintiff, Lucinda Wangelin, was at the time of the commencement of this suit and still is a citizen of the State of Illinois. Your petitioner states that in the suit above mentioned there is a controversy, which is wholly between citizens of different States, and which can be fully and completely determined as between them, to wit, a controversy between the said petitioner, the said Louisville and Nashville Railroad Company, and the said plaintiff, Lucinda Wangelin, and that the facts in regard to said suit and the supposed trespass in plaintiff's declaration mentioned are as follows: That a railway corporation, named the St. Louis and Southeastern Railway Company, was duly incorporated and organized under an act of the General Assembly of the State of Illinois entitled "An act to incorporate the St. Louis and Southeastern Railway Company," in force March 10th, 1869 (Private Laws of 1869, vol. 3, page 238), reference to which act is hereby made, and that by virtue of said act said St. Louis and Southeastern Railway Company, in the years 1869, 1870, and 1871, built and became the owner of a line of railway beginning

at East St. Louis, in St. Clair county, Illinois, at a point near
14 the Mississippi river, and running thence easterly, through said county of St. Clair and through the land described in plaintiff's declaration, to McLeansboro', in Hamilton county, Illinois, and thence one line of said railway running southeasterly by way of Equality to Shawneetown, Illinois, and another line running easterly from McLeansboro' aforesaid by way of Carmi over a bridge across the Wabash river to the city of Evansville, in the State of Indiana, and in the year 1870 said St. Louis and Southeastern Railway Company, at its own cost and expense, built the railroad switch in plaintiff's declaration mentioned; that said St. Louis and Southeastern Railway Company, by virtue of the power contained in its charter, on the first day of October, A. D. 1869, made, executed, and delivered to George Opdyke and Philo C. Calhoun, as trustees, its certain deed of trust, in the nature of mortgage, upon all its property and franchises, including said railroad switch in plaintiff's declaration mentioned, to secure the payment of certain mortgage bonds issued by it, and said deed of trust was afterwards recorded as required by law; that afterwards said St. Louis and Southeastern Railway Company consolidated its property rights and franchises with railroad corporations of other States, and after said consolidation said company took and used the name "St. Louis and Southeastern
14½ Railway Company (Consolidated)," and said St. Louis and Southeastern Railway Company (Consolidated), on the first day of October, A. D. 1872, made, executed, and delivered to George Opdyke and Philo C. Calhoun, as trustees, its certain deed of trust upon all its property and franchises, including said railway switch in plaintiff's declaration mentioned, to secure the payment of certain consolidated mortgage bonds issued by it, and that said last-mentioned deed of trust was duly recorded as required by law; that said St. Louis and Southeastern Railway Company and said St. Louis and Southeastern Railway Company (Consolidated) operated said line of railway from the time it was built to November first, 1874; that on or about October 21st, 1874, a bill in equity was filed in the United States circuit court for the southern district of Illinois against said St. Louis and Southeastern Railway Company (Consolidated) for the foreclosure of said second or consolidated mortgage and the appointment of a receiver; that said United States court appointed a receiver who, on the first day of November, 1874, took possession of said line of railway, including said switch, and operated the same under the direction of said court, and that said line of railway was, from said first day of November, 1874, until the first day of January, 1880, operated by receivers appointed by said United
15 States circuit court; that in the latter part of the year 1879, James H. Wilson, the receiver then operating said railway, with the consent and approval of said United States circuit court, leased said line of railway, including said switch, to the Nashville, Chattanooga and St. Louis railway, and said Nashville, Chattanooga and St. Louis railway operated said railway under said lease until May first, 1880, and on said last-mentioned date your petitioner, under an assignment of said lease from said Nashville, Chattanooga

and St. Louis railway, with the approval of said United States court, came into possession of said line of railway, including said switch, and operated said line of railway under said assignment of said lease until January 27th, 1881. Your petitioner further shows that there was filed to the June term, 1879, of said United States circuit court a bill in equity by Frederick William Olwel *et al.* against said St. Louis and Southeastern Railway Company (Consolidated) *et al.* for the foreclosure of said mortgage made, as hereinbefore stated, on the first day of October, 1869, and that afterwards both of said deeds of trust, made as hereinbefore stated, were by decrees of foreclosure, properly entered in said United States circuit court for the southern district of Illinois and in the United States circuit court for the district of Indiana, foreclosed and by order of said circuit courts
16 said St. Louis and Southeastern railway, with all its property, appurtenances, rights, and franchises, was, on the 16th day of November, A. D. 1880, sold under said decree of foreclosure, and at said sale William F. Whitehouse and Charles W. Opdyke purchased said railway for said Southeast and St. Louis Railway Company, and that on the 27th day of January, 1881, said William F. Whitehouse and wife and Charles W. Opdyke and wife conveyed said railway so purchased by them as aforesaid to said Southeast and St. Louis Railway Company. Your petitioner further shows that the defendant, The Southeast and St. Louis Railway Company, was incorporated and organized as a corporation under the laws of the State of Illinois on the 12th day of November, A. D. 1880, and not prior thereto, and that the supposed trespasses alleged in plaintiff's declaration were committed in the month of August, 1880, if they were committed; that at the time said supposed trespasses mentioned in plaintiff's declaration were committed, if they were committed, the defendant, The Southeast and St. Louis Railway Company, had no corporate or legal existence and no existence, in fact; had no stockholders, officers, agents, employees, or servants, and had taken no steps whatever to become a corporation, and was not in any way acting as a corporation or otherwise; that said Southeast and St. Louis Railway Company never came into possession
17 of said St. Louis and Southeastern railway, the same railway mentioned in plaintiff's declaration, until the 27th day of January, A. D. 1881, and on said last-mentioned day said Southeast and St. Louis Railway Company entered into a contract with your petitioner to operate said railway purchased as aforesaid by said Southeast and St. Louis Railway Company, and, in pursuance of said contract, you- petitioner has, since said 27th day of January, 1881, operated and is now operating said railway; that at the time said supposed trespasses in plaintiff's declaration mentioned were committed, if they were committed, your petitioner was in the sole and exclusive possession of said St. Louis and Southeastern railway, operating the same under said assignment of said lease from said Nashville, Chattanooga & St. Louis railway as aforesaid.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States for the southern district of Illinois, on the first day of its next

session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to
18 accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Illinois; and it will ever pray.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner*,
By J. M. HAMILL, *Attorney*.

STATE OF KENTUCKY, }
Jefferson County. }

M. H. Smith, being first duly sworn, upon oath says that he is the vice-president of the Louisville and Nashville Railroad Company, the above-named petitioner, and that he is acquainted with the matters and things set forth in the foregoing petition, and that the same are true in substance and in fact.

M. H. SMITH.

Subscribed by the said M. H. Smith in my presence and by him sworn to before me, at Louisville, in the county and State aforesaid, this eighth day of June, A. D. 1883.

JOHN D. POPE,
[L. S.] *Notary Public in and for Jefferson County, State of Kentucky.*

Be it remembered that on the 11th day of June, 1883, the following bond was filed, to wit:

19 *Bond for Removal.*

Know all men by these presents that the Louisville and Nashville Railroad Company, as principal, and J. M. Hamill and A. S. Wilderman, of the county of St. Clair and State of Illinois, as sureties, are held and firmly bound unto Lucinda Wangelin in the penal sum of five hundred dollars, the payment whereof, well and truly to be made, unto the said Lucinda Wangelin, her heirs, executors, administrators, and assigns, we bind ourselves, our heirs, representatives, executors, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Louisville and Nashville Railroad Company having petitioned the circuit court of St. Clair county, State of Illinois, for the removal of a certain cause therein pending, wherein Lucinda Wangelin is plaintiff and The Louisville and Nashville Railroad Company and Southeast and St. Louis Railway Company are defendants, to the circuit court of the United States in and for the southern district of Illinois:

Now, if the said Louisville and Nashville Railroad Company, your petitioner, shall enter in the said circuit court of the United States for the southern district of Illinois, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said *said* court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and effect.

Witness our hands and seals this eighth day of June, A. D. 1883.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, [SEAL.]
By M. H. SMITH, *Vice-President.*
J. M. HAMILL. [SEAL.]
A. S. WILDERMAN. [SEAL.]

Attest: A. M. QUARRIER, *Ass't Sec't'y.*

STATE OF ILLINOIS, }
St. Clair County. }

I, J. M. Hamill, of said St. Clair county, one of the sureties named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Illinois and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property exempt by law from execution; that I have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

J. M. HAMILL.

Subscribed and sworn to before me this 11th day of June, 1883.
[L. S.] A. S. WILDERMAN, *N. P.*

21 STATE OF ILLINOIS, }
St. Clair County. }

I, A. S. Wilderman, of said St. Clair county, on- of the sureties named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Illinois and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

A. S. WILDERMAN.

Subscribed and sworn to before me this 11th day of June, A. D. 1883.
[L. S.] J. M. HAMILL, *N. P.*

Be it remembered that at the May term, 1883, the following proceedings were had, to wit:

Order for Removal.

LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE SOUTHEAST AND ST. LOUIS RAILWAY COMPANY. } Trespass.

On the 13th day of June, 1883, came the parties, by their attorneys, and the defendant, The Louisville and Nashville Railroad
22 Company, having filed its petition and bond for the removal of this cause to the circuit court of the United States in and for the southern district of Illinois, and also its motion to remove, &c., and the court, having considered said motion and petition and being fully advised in the premises, allows said motion. It is therefore considered and adjudged by the court that this cause be removed to the circuit court of the United States in and for the southern district of Illinois, and that the clerk of this court certify the record in this cause to said court according to the statute in such case made and provided.

STATE OF ILLINOIS, } ss:
St. Clair County, }

I, George H. Stolberg, clerk of the circuit court of St. Clair county, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of præcipe for summons, declaration, summons, plea of L. & N. R. R. Co., plea of S. E. & St. L. R'y Co., motion to remove cause, &c., petition for removal, &c., bond for removal, &c., and order of court; and I further certify that the same is a complete record in a certain cause lately pending in said court, on the law side thereof, wherein Lucinda Wangelin was plaintiff and Louisville and Nashville Railroad Company *et al.* were defendants.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Belleville, this 16th day of October, A. D. 1883.

GEORGE H. STOLBERG, *Clerk.*

(Indorsed:) Filed December 12, 1883. J. A. Jones, clerk.

23 And afterwards, to wit, on the ninth day of January, in the January term of said circuit court of the United States, in the year eighteen hundred and eighty-four, the following proceedings were had and entered of record, to wit:

Leave to File Additional Pleas.

LUCINDA WANGELIN
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.* } Trespass.

On motion of the Louisville and Nashville Railroad Company, by J. M. Hamill, Esq., its attorney, leave is granted it to file additional pleas by the 1st day of February next.

Then, afterwards, to wit, on the first day of February of the year last aforesaid, came again said defendant, The Louisville and Nashville Railroad Company, by its attorney, J. M. Hamill, Esq., and filed in the clerk's office of said circuit court of the United States its pleas herein; which said pleas are in the words and figures following, to wit:

24 *Pleas.*

UNITED STATES OF AMERICA,
Southern District of Illinois, } *ss:*

In the United States Circuit Court. January Term, A. D. 1884.

LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY *et al.* } Trespass.

Pleas of the defendant, The Louisville and Nashville Railroad Company.

And the defendant, The Louisville and Nashville Railroad Company, by J. M. Hamill, its attorney, for further plea in this behalf, by leave of the court first had and obtained, comes and defends the force and injury when, &c., and prays judgment of the said writ and declaration, because it says that before the exhibiting of the said declaration to the May term, A. D. 1883, of the circuit court of St. Clair county, Illinois, in said cause, at, to wit, the September term, A. D. 1881, of the circuit court of said St. Clair county, the tenants of said plaintiff, Richard Thomas, William House, and James Beck, then in the possession of the same premises described in plaintiff's declaration, impleaded the said defendant, The Louisville and Nashville Railroad Company, and exhibited against it their decla-
25 ration in the sum of ten thousand dollars damages for the same identical supposed cause of action, the same alleged damages, and the same alleged trespasses and injuries in taking up and removing a railroad switch and thereby causing alleged injuries to a certain coal mine, as in the said declaration in this present suit mentioned, as by the records and proceedings thereof remaining in this court more fully appears; and afterwards the said suit of the said Richard Thomas, William House, and James Beck against said defendant, The Louisville and Nashville Railroad Company, and the action in this cause were removed from the circuit court of said

St. Clair county into this court, where both of said actions are now pending.

And the defendant, The Louisville and Nashville Railroad Company, further saith at the time of the committing of the said supposed trespasses the defendant, The Southeast and St. Louis Railway Company, had no legal, corporate, or other existence, and that the plaintiffs in the said former suit were the tenants and in the possession of the premises in this declaration mentioned, and that the
26 plaintiff in this suit, the said Lucinda Wangelin, was the landlord of the plaintiffs in said former suit, and that the defendant, the said Louisville and Nashville Railroad Company, in said former suit and in this suit is the same corporation, and that the said supposed trespasses mentioned in said former suit and in this suit are the same identical trespasses and not other or different, and that the said former suit so brought and prosecuted against the said defendant, The Louisville and Nashville Railroad Company, by the said plaintiffs as aforesaid is still depending and undetermined in this court; and this the defendant, The Louisville and Nashville Railroad Company, is ready to verify. Wherefore it prays judgment of said writ in this suit, and that the same may be quashed, &c.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY, *Defendant*,
By J. M. HAMILL, *Its Attorney*.

2nd Plea.

And, for a further plea in this behalf, by leave of the court first had and obtained, the defendant, The Louisville and Nashville Railroad Company, says that the plaintiff ought not to have her aforesaid action against it, the defendant because it says that by virtue of an act of the General Assembly of the State of Illinois entitled
27 "An act to incorporate the St. Louis and Southeastern Railway Company," in force March 10th, 1869, Private Laws of 1869, volume 3, page 238, reference to which act is hereby made, said railway company had full power to locate, construct, furnish, maintain, and operate a railway with one or more tracks across the whole State of Illinois from the bank of the Mississippi river opposite the city of St. Louis, Missouri, through the county of St. Clair and through the premises described in plaintiff's declaration, and said railway company, by said act, was authorized to lay out its said railway, not exceeding one hundred and fifty feet in width, through its whole length, and to enter upon and into the lands and grounds of the State, of any person or persons, or bodies politic or corporate and survey and take levels of the same or any part thereof, and to lot out and ascertain such parts as they may deem necessary for building said railway, with one or more tracks, sidings, and branches, and for all the purposes connected with said railway to take, appropriate, and use any lands, to cut down all timber and other trees within seventy-five feet of the centre line of said railway and also to erect,

build, set up, in and upon the route of said railway
28 or upon the lands adjoining the same, all such works, banks, ways, roads, and conveniences as may be required for the purposes of said railway, and to widen, amend, repair, and improve the same from time to time as may be found necessary; and said St. Louis and Southeastern Railway Company, by the leave, lisence, and consent of the plaintiff and by virtue of the power conferred by its charter, in the year 1870 entered into and upon the premises described in plaintiff's declaration, &, at great cost and expense to said railway company, with its own iron rails and wooden cross-ties and with laborers paid by it, erected, built, and constructed a side track connecting a coal mine belonging to said plaintiff to the main track of said St. Louis and Southeastern railway, and said switch so constructed is the same mentioned in plaintiff's declaration, and it remained upon said premises from the time it was constructed with the knowledge and consent of plaintiff until it was taken up, as hereinafter stated. Said St. Louis and Southeastern Railway Company, after said switch was built upon said land, made, executed, and delivered to George Opdyke and Philo C. Calhoun, as trustees, its two certain deeds of trust in the nature of a mortgage upon all
29 its property, rights, and franchises, including said switch, to secure large sums of money borrowed by it.

That afterwards, by proceedings instituted in this court against said St. Louis and Southeastern Railway Company for the foreclosure of said deeds of trust or mortgages, said St. Louis and Southeastern railway, with all its property, rights, and franchises, including said switch, was, by the decree of this court on the 16th day of November, A. D. 1880, sold at public auction to pay the amount due as principal and interest on the deeds of trust aforesaid, and that at such sale said St. Louis and Southeastern railway, with all its property, rights, and franchises, including said switch, was purchased by Charles W. Opdyke and William F. Whitehouse for the bondholders of said St. Louis and Southeastern railway, and said railway, with all its property, rights, and franchises, was transferred by said Opdyke and Whitehouse and their respective wives to the Southeast and St. Louis Railway Company, a corporation organized and existing under the laws of the State of Illinois, and, on the 27th day of January, A. D. 1881, said Southeast and St. Louis Railroad Company made, executed, and delivered to the defendant, The Louisville and Nashville Railroad Company, a lease for the period of forty-nine years,
30 by which it granted, demised, and leased for the period aforesaid to said Louisville and Nashville Railroad Company all the railway tracks, rights of way, appurtenances, rights, and franchises, including said switch, formerly owned by said St. Louis and Southeastern Railway Company, and said defendant, The Louisville and Nashville Railroad Company, has been since the date of said lease in the possession of said railway property under said lease. Defendant further avers that for default in the payment of the interest due on said deeds of trust made by said St. Louis and Southeastern Railway Company said railway, with all its property, including said switch, was, by the order of this court, in October, A.

D. 1874, placed in the hands of a receiver appointed by this court, and was operated by said receiver and his successor in office until about January first, A. D. 1880, when, by authority of this court, all of said railway property, including said switch, was leased by the receiver then operating said railway to the Nashville, Chattanooga and St. Louis railway, and said last-mentioned railway operated said St. Louis and Southeastern railway until about May 1st, 1880, when said Nashville, Chattanooga and St. Louis railway as-
31 signed and transferred its lease of said St. Louis and Southeastern railway to the defendant, The Louisville and Nashville Railroad Company, and said defendant, under the assignment of said last-mentioned lease, came into possession on the day last aforesaid of all the property, rights, and franchises of said St. Louis and Southeastern Railway Company, including said switch, and remained in possession of all of said railway property until it, said defendant, leased said railway property from said Southeast and St. Louis Railway Company, as hereinbefore stated.

And from the time said switch was built, in the early part of the year 1870, until August or September, 1880, said St. Louis and Southeastern Railway Company, the receivers of said railway, said Nashville, Chattanooga and St. Louis railway, and said defendant, The Louisville and Nashville Railroad Company, have been in the actual, open, notorious, and continuous possession of said switch, as hereinbefore stated, with the full knowledge, consent, and continued acquies-ence of said plaintiff to said possession.

And defendant avers that while of [in] the possession of said switch as aforesaid defendant, needing to use the iron rails laid
32 in said switch at other places on its line of road, and said coal mine not having been operated for two years or more, and said switch not having been used from the time when said coal mine ceased to be operated, defendant, while in the possession of said railway and said switch under the assignment of said lease, in August or September, 1880, without any more force than was necessary for that purpose and without injuring [injury] to the soil or freehold, took up and removed the iron rails on said switch, as it lawfully might, for the cause aforesaid; and these are the said several supposed trespasses in said declaration mentioned; and this the defendant is ready to verify. Wherefore it pray- judgment, etc.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY, *Defendant*,
By J. M. HAMILL, *Its Attorney*.

3rd Plea.

And, for a further plea in this behalf, by leave of the court first had and obtained, the defendant, The Louisville and Nashville Rail-
road Company, says that the plaintiff ought not to have her
33 aforesaid action against it, the defendant, because it says that at the time of the committing of the said several supposed trespasses in plaintiff's declaration mentioned Richard Thomas, William House, and James Beck, under a lease from the plaintiff,

were in possession of the premises mentioned and described in the plaintiff's declaration; and this the defendant is ready to verify. Wherefore it prays judgment, etc.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY, *Defendant*,
By J. M. HAMILL, *Its Attorney*.

(Indorsed:) Filed February 1, 1884. J. A. Jones, clerk.

Afterwards, to wit, on the twenty-fourth day of April, in the January term of said court, in the year of our Lord eighteen hundred and eighty-five, the following further proceedings were had in said court in said cause and entered of record, to wit:

34 *Leave to File Additional Pleas by 1st Monday, June*, 1885.

LUCINDA WANGELIN
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Trespass.

On motion of defendant, by J. M. Hamill, Esq., its attorney, the time to file additional pleas herein is extended until the first Monday of June next.

And afterwards, to wit, on the twenty-eighth day of May, of the year last aforesaid, came again said defendant, by J. M. Hamill, Esq., its attorney, and filed in the office of the clerk of the circuit court of the United States its fourth special plea herein; which said plea is in the words and figures following, to wit:

4th Special Plea.

UNITED STATES OF AMERICA,
Southern District of Illinois, } *ss*:

In the United States Circuit Court. January Term, A. D. 1885.

LUCINDA WANGELIN
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY *et al.* } Trespass.

Fourth special plea of the defendant, The Louisville and
35 Nashville Railroad Company, filed by leave of court.—And, for a further plea in this behalf, by leave of the court first had and obtained, the defendant, The Louisville and Nashville Railroad Company, says that the plaintiff ought not to have her aforesaid action against it, the defendant, because it says that at the time of the committing of the said several supposed trespasses in plaintiff's declaration mentioned one John Maule, under and by virtue of a lease from the plaintiff, was in the possession of the premises mentioned and described in plaintiff's declaration; and this the defendant is ready to verify. Wherefore it prays judgment, etc.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY, *Defendant*,
By J. M. HAMILL, *Its Attorney*.

(Indorsed:) Filed May 28, 1885. J. A. Jones, clerk.

Afterwards, to wit, on the ninth day of October, in the year last aforesaid, came the plaintiff, by Charles W. Thomas, Esq., her attorney, and entered and filed her motion to remand this cause to the circuit court of St. Clair county, Illinois, which said motion to remand is in the words and figures following, to wit:

36 *Motion to Remand Cause.*

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1885.

LUCINDA WANGELIN
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE SOUTHEAST AND ST. LOUIS RAILWAY COMPANY. } Ejectment.

And now comes the said plaintiff, by Charles W. Thomas, her attorney, and moves the court to remand the said cause to the circuit court of St. Clair county, Illinois, for reasons apparent upon the face of the record.

CHARLES W. THOMAS,
Plaintiff's Attorney.

(Indorsed:) Filed October 9, 1885. J. A. Jones, clerk.

Then, afterwards, to wit, on the seventh day of April, in the January term of the circuit court of the United States, in the year of our Lord one thousand eight hundred and eighty-six, the following further proceedings were had in said court in said cause and entered of record, to wit:

37 *Order Sustaining Motion to Remand Suit & Remanding Suit.*

LUCINDA WANGELIN
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE SOUTHEAST AND ST. LOUIS RAILWAY COMPANY. } Trespass.

And now, on this 7th day of April, 1886, come the parties, by their counsel, and submit to the court the plaintiff's motion to remand this cause to the State court in which it originated, and the court, having heard and considered the same, as well as the arguments of counsel thereon, and being sufficiently advised in the premises, doth order that the motion be sustained, and that the suit be remanded to the circuit court of St. Clair county, Illinois.

Now, afterwards, to wit, on the ninth day of April, in the January term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order Allowing Writ of Error.

LUCINDA WANGELIN
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE SOUTHEAST AND ST. LOUIS RAILWAY COMPANY. } Trespass.

38 And now, on this ninth day of April, 1886, come again the parties, by their counsel, and on motion of the defendant, The Louisville and Nashville Railroad Company, a writ of error from the decision of this court remanding this cause to the State court is allowed said defendant to the Supreme Court of the United States on its entering into bond to the plaintiff in the penalty of five hundred dollars, conditioned as the law directs, with sureties, to be approved by the court, within sixty days from this date.

Afterwards, to wit, on the twenty-ninth day of May of the year last aforesaid, came again The Louisville and Nashville Railroad Company, defendant, by J. M. Hamill, Esq., its attorney, and filed its bond on writ of error herein; which said bond is in the words and figures following, to wit:

Bond on Writ of Error.

Circuit Court of the United States, Southern District of Illinois.

LUCINDA WANGELIN
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SOUTHEAST AND ST. LOUIS RAILWAY COMPANY. } Trespass.

39 Know all men by these presents that we, The Louisville and Nashville Railroad Company, as principal, and J. M. Hamill and A. S. Wilderman, of the county of St. Clair and State of Illinois, as sureties, are held and firmly bound unto Lucinda Wangelin in the sum of five hundred dollars, to be paid to the said Lucinda Wangelin, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this sixth day of May, A. D. 1886. Whereas the above-named The Louisville and Nashville Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois, at Springfield, remanding the above-entitled suit to the circuit court of St. Clair county, Illinois: Now, therefore, the condition of this obligation is such that if the above-named The Louisville and Nashville Railroad Company shall prosecute its said writ of error to effect and

answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall
40 be and remain in full force and virtue.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
[L. S.] By M. H. SMITH, *President.*

Attest:
R. K. WARREN, *Secretary.*

J. M. HAMILL. [SEAL.]
A. S. WILDERMAN. [SEAL.]

Approved by—
S. H. TREAT, *Dist. Judge.*

May 29th, 1886.

(Indorsed:) Filed May 29, 1886. J. A. Jones, clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and proceedings thereon had in a certain cause wherein Lucinda
41 Wangelin is plaintiff and The Louisville and Nashville Railroad Company and The Southeast and St. Louis Railway Company are defendants, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this tenth day of July, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

J. A. JONES, *Clerk.*

42 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

To Lucinda Wangelin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The Louisville and Nashville Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. S. H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this 6th day of July, in the year of our Lord 1886, and of our Independence the 111th year.

S. H. TREAT,
District Judge U. S., Southern District of Illinois.

I hereby accept service of the above citation this 7th day of July, 1886.

LUCINDA WANGELIN,
By CHARLES W. THOMAS, *Att'y.*

43 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, to the October Term, A. D. 1886.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error, *vs.* LUCINDA WANGELIN, Defendant in Error. } Assignment of Errors.

And now comes The Louisville and Nashville Railroad Company, the plaintiff in error, by J. M. Hamill, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

The United States circuit court erred in rendering judgment against the plaintiff in error — ordering this cause to be remanded to the circuit court of St. Clair county, Illinois, on the motion of the defendant in error.

By reason whereof the plaintiff in error prays that said judgment may be reversed, etc.

By J. M. HAMILL,
Attorney for Plaintiff in Error.

Endorsed on cover: S. Illinois C. C. U. S. No. 169. The Louisville & Nashville Railroad Company, plaintiff in error, *vs.* Lucinda Wangelin. Filed October 13, 1886.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1889.

No. 169.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

—*vs.*—

LUCINDA WANGELIN,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF PLAINTIFF IN ERROR.

J. M. HAMILL,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1889.

No. 169.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

—*vs.*—

LUCINDA WANGELIN,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF PLAINTIFF IN ERROR.

I. STATEMENT.

This was an action of trespass *quare clausem freigt* and with force and arms commenced in the circuit court of St. Clair County, Illinois, on the 9th day of May, 1883, by the defendant in error, against plaintiff in error and the Southeast and St. Louis Railway Company, to recover damages for taking up and removing a railroad switch. On the petition of plaintiff in error, the cause was, on the 13th day of June, 1883, by order of the circuit court of St. Clair County, removed to the United States circuit court for the Southern District of Illinois, and the record was filed in that court on the 12th day of December, 1883.

On the 9th day of October, 1885, defendant in error filed her motion to remand the cause to the

circuit court of St. Clair County, Illinois, for reasons apparent upon the face of the record, and on the 7th day of April, 1886, the court sustained the motion and ordered the cause to be remanded to the circuit court of St. Clair County, Illinois.

To reverse that decision of the court, the plaintiff in error has prosecuted this writ of error and brought the cause to this court.

The record was filed in this court on the 13th day of October, 1886, and the error assigned is, that the United States circuit court erred in rendering judgment against the plaintiff in error, ordering this cause to be remanded to the circuit court of St. Clair County, Illinois, with a prayer that said judgment may be reversed.

The declaration alleges that the trespasses for which this suit was brought, were committed in January, 1879. (Record p. 3.) The petition of plaintiff in error for removal states that the defendant, the Southeast and St. Louis Railway Company, was incorporated and organized as a corporation under the laws of the State of Illinois, on the 12th day of November, 1880, and not prior thereto, and that the acts complained of as trespasses were committed, if committed at all, in August, 1880; and at the time the supposed trespasses were committed, the defendant, the Southeast and St. Louis Railway Company, had no corporate or legal existence and no existence in fact; had no stockholders, officers, agents, employes or servants, and had taken no steps whatever to become a corporation and was not in any way acting as a corporation or otherwise, and that it never came into possession of the railway described in plaintiff's declaration until the 27th day of Janu-

ary, 1881, and on said last mentioned day it entered into a contract with the plaintiff in error to operate said railway, and in pursuance of said contract plaintiff in error has since said 27th day of January, 1881, operated and is now operating said railway; that at the time said supposed trespasses were committed, plaintiff in error was in the sole and exclusive possession of said railway and switch in plaintiff's declaration mentioned operating the same under an assignment of the lease from the Nashville, Chattanooga and St. Louis Railway. (Record p. 8.)

From these statements in the record it appears that the supposed trespasses, for the committing of which the Southeast and St. Louis Railway Company was joined as a defendant with the plaintiff in error, were committed before the Southeast and St. Louis Railway Company had any existence in fact or in law, and before it had taken any steps whatever to become a corporation. It further appears from the record that at the time the supposed trespasses were committed the plaintiff in error was in the sole and exclusive possession of the railway and switch in plaintiff's declaration mentioned.

II. The Circuit Court of the United States Erred in Remanding the Cause.

The question presented by this record is, could defendant in error by joining with the plaintiff in error as a co-defendant, a corporation which at the time the supposed trespasses were committed had no existence in fact or in law, defeat the right of the plaintiff in error to remove the cause from the State to the Federal court? The Act of March 3, 1875, in regard to removal of causes was in force when this cause was

removed from the State to the Federal court, when remanded to the State court and when this writ of error was sued out and the record filed in this court, hence the right to removal must be determined under that Act. The last clause of the second section of that Act 18 Statutes at Large 471, provides: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The plaintiff in error was a citizen of the State of Kentucky, defendant in error was a citizen of the State of Illinois, and the amount in controversy exceeded exclusive of costs the sum of five hundred dollars, hence the right of the plaintiff in error to remove the cause to the United States court was complete under the Act of March 3, 1875, and that right could not be defeated by uniting with the plaintiff in error as a co-defendant in the suit a corporation which had no existence at the time the trespasses for which the suit is brought were committed.

It has always been held by this court that formal parties or nominal parties or parties without interest united with the real parties to the suit cannot oust the Federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer jurisdiction. The joinder by plaintiffs in a State court of defendants citizens of the same State, who have no interest in the controversy and whose relation to the suit appears from the record, will not deprive the defendants in interest citizens of another

State, of the right to remove the cause to the Federal courts.

Wood, et al., v. Davis, 18 Howard, 467;
Carneal, et al., v. Banks, 10 Wheaton, 181;
Browne, et al., v. Strode, 5 Cranch, 303;
Boon's Heirs v. Chiles, et al., 8 Peters, 532.

Where the real and only controversy is between citizens of different States and the plaintiff is by some positive law compelled to use the name of a public officer, who has not, or ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.

McNutt v. Bland, et al., 2 Howard, 9.

Mr. Justice Story, in delivering the opinion of the court in *Wormley, et al., v. Wormley*, 8 Wheaton, 421, said: "This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before it whenever it can be done without prejudice to the rights of others."

In *Walden v. Skinner*, 101 United States, 589, this court said: "Where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act, who has not ever had any interest in or control over it, the courts of the United States will not consider any others as par-

ties to the suit than the persons between whom the litigation before them exists." "Cases arise in the Federal courts in which nominal or even immaterial parties are joined on the one side or the other, with those who have the requisite citizenship to give the court jurisdiction in the case; and where that is so, the rule is settled that the mere fact that one or more of such parties reside in the same State with one of the actual parties to the controversy will not defeat the jurisdiction of the court. * * Decisive authority for that proposition is found in a recent ruling of Mr. Justice Miller, in which he states to the effect that mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different States.

Arapahoe County v. Kansas Pacific Railway Company, 4 Dill., 277–283;"
Removal Cases, 100 United States, 457;
Bacon v. Rives, 106 United States, 99.

These authorities establish the rule that the jurisdiction of the United States circuit courts, when it is founded upon the citizenship of the parties, rests upon that of the *real* and not of the *nominal* or wholly *immaterial* parties to the suit. As the Southeast and St. Louis Railway Company had no existence at the time the supposed trespasses were committed, it would be difficult to state a case where a party was more completely destitute of interest in a cause than it is in this suit. As it has no interest in the suit, it is perfectly apparent that the sole object in making it a defendant is to attempt to defeat the jurisdiction of the United States circuit court in a case where the

jurisdiction of that court is as certain and complete as any case can be which is founded alone upon the citizenship of the parties.

If this attempt shall succeed then the jurisdiction of every United States circuit court in every State in the Union can be defeated in all cases founded upon the citizenship of the parties by the mere subterfuge or artifice of uniting with the real defendant in the suit a sham defendant who shall be a citizen of the same State with the plaintiff. Uniting a pretended defendant who has and can have no possible interest in the litigation with the real defendant in the controversy, when it is done for the sole purpose of defeating the jurisdiction of the United States courts, is a fraud upon those courts which they cannot sustain or tolerate.

That jurisdiction cannot be conferred upon or taken away from any court by fraud or collusion is a proposition that will not be questioned.

This court rigidly aud zealously enforces that rule whenever an attempt is made to confer jurisdiction upon it by fraud. Mr. Chief Justice Waite, in delivering the opinion of the court in *Hartog v. Memory*, 116 United States, 591, said: "Beyond this, no doubt, if from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried or by some other appropriate form of proceeding, and act for its own protection against fraud or imposition."

Mr. Justice Harlan, in delivering the opinion of the court in *Morris v. Gilmer*, 129 United States,

329, said: "If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and the fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his declarations to the contrary may have been."

Is it not as much the duty of the court to protect and sustain its jurisdiction in a case where it actually exists from fraud or imposition, as it is to deny it in a case where it is attempted to confer jurisdiction upon it by fraud or imposition? The record in this case presents facts which show conclusively that the United States circuit court had jurisdiction of the cause and an attempt to defeat that jurisdiction by joining with the real defendant, a sham defendant which had no existence at the time the cause of action accrued. A defendant which had no existence at the time the cause of action accrued is no more liable than a defendant which never had an existence. Where a defendant which had no existence at the time the cause of action accrued is joined with the real defendant in the suit for the sole purpose of defeating the jurisdiction of the United States circuit court, is it not a barefaced imposition upon that court, and an attempt by a mere fraudulent device to deprive it of jurisdiction in the cause? If such a device can succeed then the jurisdiction of the United States courts founded upon citizenship is a thing of the past, and the judicial power conferred by the Constitution of the United States and Congress upon the Federal courts in controversies between citizens of different States, a constitutional right, will be

taken away by that greater power of construction.

This case does not fall within the rule laid down in

Peper v. Fordyce, 119 United States, 469;
Thorn Wire Hedge Co. v. Fuller, 122 United States, 535;
Plymouth Mining Co. v. Amador Canal Co., 118 United States, 264;
Rand v. Walker, 117 United States, 340;
Thayer v. Life Association, 112 United States, 717.

It these cases it was held that the defendants who were citizens of the same State with the plaintiffs were indispensable parties and that there was no separable controversy. It cannot be claimed that a defendant who had no existence at the time the right of action accrued is an indispensable party to a suit. Neither is this case within the rule laid down in

Louisville and Nashville Railroad Co. v. Ide, 114 United States, 52;
Pirie v. Tvedt, 115 United States, 41;
Starin v. New York, 115 United States, 248;
Sloane v. Anderson, 117 United States, 275.

In these cases it was said "that a defendant has no right to say that an action shall be several which a plaintiff elects to make joint." But a plaintiff has no right fraudulently to elect to make an action joint solely for the purpose of depriving one of the joint defendants of a right which it posesses under the Constitution of the United States and the laws enacted by Congress, the right to remove the suit against it from the State to the Federal court, when

it appears from the record that the defendant which was joined with the real defendant has no interest in the controversy and had no existence in fact or in law at the time the cause of action accrued. Whenever it is clear that the plaintiff has acted fraudulently in joining an immaterial defendant, or one not in existence, with the real defendant for the express purpose of depriving the real defendant of such a right as this, then the defendant has a right to say that the action shall be several which the plaintiff has elected to make joint.

When it appears as it does from the record in this case that the defendant joined with the real defendant, so far as this litigation is concerned, is a mere myth joined in the action for the express purpose of defeating the jurisdiction of the United States circuit court, is it not the duty of the court to brush aside this trifling myth and look only at the real parties to this controversy?

If it will do so, it will find here a "controversy which is wholly between citizens of different States and which can be fully determined as between them," and a suit of which the United States circuit court had as complete jurisdiction as in any action founded upon citizenship alone.

Respectfully submitted.

J. M. HAMILL,
Attorney for Plaintiff in Error.

NOV 25 1889

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1889.

No. 169.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

LUCINDA WANGELIN,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF DEFENDANT IN ERROR.

CHARLES W. THOMAS,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Octobeber Term. A. D. 1889

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
vs.
LUCINDA WANGELIN.

Error to Circuit Court for the Southern District of Illinois.

BRIEF OF DEFENDANT IN ERROR.

The authorities cited in the brief of the learned counsel for plaintiff in error sustain the order of the Circuit Court remanding this cause.

This Court cannot determine on this record the question whether one of the defendants had a corporate existence or was concerned in the alleged trespass. The allegations made in the petition for a removal not necessary to bring the case within the statute, are mere surplusage and raise a issue that cannot be tried, or if it can be tried, will be presumed in this case to have been tried in the Circuit Court and determined against the plaintiff in error on evidence not preserved by a Bill of Exceptions. The case seems to be one where a motion to affirm would have prevailed if it had been made in this Court.

CHARLES W. THOMAS,
Attorney for Def't in Error.

132-604
132-604

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 162.

EDWARD AVERY, ADMINISTRATOR OF MATTHIAS ELLIS, DECEASED, PLAINTIFF IN ERROR,

vs.

WILLIAM W. CLEARY, ASSIGNEE IN BANKRUPTCY OF MATTHIAS ELLIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 12, 1886.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 8, 1889.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William W. Cleary, of Covington, in the State of Kentucky, assignee in bankruptcy of the estate of Matthias Ellis, late of Carver, in the State of Massachusetts, deceased, plaintiff, and Edward Avery, of Braintree, in the State of Massachusetts, administrator of the goods and estate of Matthias Ellis, aforesaid, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the nineteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
G. M. CARPENTER,
U. S. District Judge, Rhode Island District, Assigned to Hold & Holding said Circuit Court.

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of September, A. D. 1886.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss.*:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Le Baron B. Colt, circuit judge.

WILLIAM W. CLEARY, of Covington, in the State of Kentucky, as he is Assignee in Bankruptcy of the Estate of Matthias Ellis, Late of Carver, in the County of Plymouth, Deceased, in the District of Massachusetts, Plaintiff,

vs.

EDWARD AVERY, of Braintree, in the County of Norfolk, in the District of Massachusetts, as he is Administrator of the Goods and Estate of Matthias Ellis, aforesaid, Defendant.

No. 1904.

In an action of contract.

4 *Plaintiff's Declaration. Filed Oct.* 16, 1882.

And the plaintiff says that said Ellis, on or about June, 1878, filed a petition in bankruptcy in the district court of the United States for the district of Kentucky, and was duly adjudicated a bankrupt by said court, and one H. W. Bates, of Greenup, Kentucky, was duly appointed assignee of the estate of said Ellis, and continued to act as such assignee until May, 1882, when he resigned, and the plaintiff was appointed in place of said Bates; that said Ellis, at the time he filed said petition in bankruptcy, was the owner of two certain policies of insurance upon his life, issued by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, numbered 68428 and 68430, policy No. 68428 being for ten thousand dollars and policy No. 68430 being for five thousand dollars, and also was the owner of an undivided third interest in a miscellaneous lot of tools and patterns, then in the possession of the Murdock Parlor Grate Company of Carver, Massachusetts, none of which assets were mentioned in the schedules filed by said Ellis in his proceedings in bankruptcy, or disclosed or delivered to his assignee by said Ellis in his lifetime, but the same were concealed and withheld by said Ellis from his assignee, and remained in the possession and control of said Ellis up to his death, in November, 1879, when the same were taken pos-

session of by the defendant, in his capacity as administrator of the estate of said Ellis, except that said policy No. 68430, issued by said Connecticut Mutual Life Insurance Company, had been by said Ellis, on or about March 2d, 1879, surrendered to said company, and the surrender value thereof was in part applied to pay the annual premium due on said policy No. 68428; that the defendant,
5 as administrator, collected and received from said insurance company the sum of $9,390.43 on said policy numbered 68428, and the further sum of $258.21 upon said policy numbered 68430, both of said sums being received on or about January 1st, 1880, and also sold the interest of said Ellis in said miscellaneous lot of patterns and tools on or about said January 1st, 1880, for the sum of five hundred dollars, and received the money therefor, and, well knowing the said sums of money were the property of the assignee in bankruptcy and not of the administrator of said Ellis, has failed and neglected to notify the assignee in bankruptcy thereof or to turn over the same to him, but has received the same without the knowledge or consent of said assignee in bankruptcy. And the plaintiff says the assignee in bankruptcy of said Ellis had no knowledge or information concerning said property, or the title and interest of the assignee therein, up to a short time prior to the commencement of this suit, the same being concealed by said Ellis in his lifetime, and since his death by his administrator, and that immediately upon being informed of the existence of said property he demanded the same or the proceeds thereof from the defendant. Wherefore the plaintiff says the defendant owes him the said amount received from said policies, and also from the sale of said tools and patterns; in all, the sum of ten thousand one hundred and forty-eight $\frac{64}{100}$ dollars, and interest thereon from Jan. 1st, 1880, to the date of the writ.

Second count. And the plaintiff says the defendant owes him ten thousand one hundred and forty-eight $\frac{64}{100}$ dollars, and interest thereon from Jan. 1st, 1880, to the date of the writ, for money
6 received by the defendant to the plaintiff's use—

Both of the above counts being for the same cause of action.

To the damage of the said plaintiff, as he says, the sum of twenty thousand dollars.

The writ in this cause is dated the thirtieth day of September, A. D. 1882, and was duly entered at the October term of this court, A. D. 1882, when and where the parties appeared by their respective attorneys.

On the twenty-first day of October, A. D. 1882, the following answer was filed:

Answer. (*Filed October* 21, 1882.)

Now comes the above defendant and files the following answer:

To the first count: He denies each and every averment and allegation therein contained and applies this denial to each and every date, item, and amount.

To the second count: He denies that he owes the plaintiff the

sum therein claimed or any sum whatever; he denies each and every averment, allegation, date, item, and amount contained in the said second count.

And this defendant, further answering to both counts, says that the cause of action mentioned in each of said counts did not accrue to the assignee of the estate of said Ellis, as therein set forth, within two years before the sueing out of the plaintiff's writ.

And, for further answer to both counts, this defendant says that the cause of action mentioned in each of said counts did not accrue against this defendant, in his capacity as administrator of the estate of said Ellis, within two years before the suing out of the plaintiff's writ.

EDWARD AVERY.

7 *Verdict and Judgment.*

Issue being thus joined, this cause was thence continued from term to term to this present October term, when, the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, duly assigned to hold said circuit court, sitting, the cause, after a full hearing, was submitted to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, return their verdict and on oath say: The jury find for the plaintiff, and assess damages in the sum of eleven thousand five hundred and thirty-nine dollars and fifty-six cents.

It is thereupon considered by the court, to wit, May 14, A. D. 1886, that the said William W. Cleary, assignee, plaintiff, recover of the said Edward Avery, administrator, the sum of eleven thousand seven hundred and eighty-three dollars and eighty-one cents and his costs of suit, taxed at —.

On the twenty-ninth day of January, A. D. 1886, the following bill of exceptions is filed and allowed by the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, as of the seventh day of January, A. D. 1886, before the jury left the bar, and is in the words and figures following:

Defendant's Exceptions. (*Filed as January* 7, 1886.)

This is an action of contract brought by the plaintiff, as assignee of the estate of Matthias Ellis, a bankrupt, to recover the amount received by the defendant, as administrator of the estate of said Ellis, deceased, upon two policies of insurance issued upon the life of said Ellis by the Connecticut Mutual Life Insurance Com-
8 pany, one numbered 68428 and the other numbered 68430, and also the proceeds of one undivided third of a miscellaneous lot of tools and patterns. The writ is dated Sept. 30, 1882. The pleading may be referred to as a part of this bill of exceptions. At the trial the plaintiff abandoned the claim for the proceeds of one

undivided third of the tools and patterns. The plaintiff's counsel in opening the case to the jury stated as the facts on which he should base his claim to recover that said Matthias Ellis went into bankruptcy on or about July 1, 1878; that he filed his schedules and put in substantially no property; that at that time he owned the policy No. 68428 and policy No. 68429, each for $10,000, issued by the Connecticut Mutual Life Insurance Company, and that they by operation of law passed to his assignee in bankruptcy and should have gone to his creditors; that said Ellis at one time did a large business, became embarrassed about the year eighteen hundred and seventy-one, and continued embarrassed until the time of his death; that he owed at least one hundred and fifty thousand dollars when he went into bankruptcy and had owed it for several years before; that in or about May, A. D. eighteen hundred and seventy-seven, he owed an assignment of these two and another policy of insurance in the same company to E. Rollins Morse, to hold for his, said Ellis', daughters; that this assignment was voluntary; that said Ellis was heavily indebted at the time, and that there was no consideration for the assignment, and that it was illegal, fraudulent, and void; that after filing his petition he came to Massachusetts and died in November, eighteen hundred and seventy-nine; that he took one policy from said Morse and applied its surrender
9 value to pay the premium which became due in March, 1879, on the two policies of $10,000 each, and that the plaintiff claimed that that policy also belonged to the assignee in bankruptcy; that after said Ellis' death the insurance company were called upon by the defendant, as administrator of the estate of said Ellis, to pay him under policy No. 68428, and that he, Avery, was met by the statement that there was an assignment of it to E. Rollins Morse, and that said Morse, having been consulted by said Avery, disclaimed and wrote a letter saying that he made no claim; that the plaintiff would show that said Morse never accepted the trust or knew of the assignment; that after said letter of said Morse the insurance company paid to said Avery the proceeds of policy No. 68428, less interest and a note given by said Ellis, and likewise paid to defendant two hundred fifty-eight dollars and twenty-one cents, the balance in their hands belonging to the surrender-policy. The plaintiff introduced in evidence the record of the district court of the United States for the district of Kentucky, by which it appeared that said Matthias Ellis filed his petition in bankruptcy in that court on the third day of July, A. D. eighteen hundred and seventy-eight. In the schedule of his assets, Schedule "B" (2), under the words description of personal property, were the following:

		Value.
(1.) Cash in hand	None.	0 00
(2.) Bills of exchange, notes & securities	"	0 00
(3.) Stock in trade	"	0 00
(4.) Household goods, furniture, household stores	"	0 00
Wearing apparel	claimed as exempt	200 00
One gold watch	claimed as exempt	75 00
One finger ring	claimed as exempt	15 00

	(5.) Books, prints, & pictures	None.	0 00
10	(6.) Horses, cows, sheep, and other animals	None.	0 00
	(7.) Carriages and other vehicles	"	0 00
	(8.) Farming stock & implements of husbandry	"	0 00
	(9.) Shipping and shares in vessels	"	0 00
	(10.) Machinery, fixtures, and apparatus used in business	"	0 00
	(11.) All other goods and personal property	"	0 00

Schedule B (3) of his assets is as follows:

Petition by Bankrupt. Schedule B (3).

Choses in action.

Instructions.—Enter the items in the following order: 1, debts one [due] petitioner on open account; 2, stocks in incorporated companies and interest in joint-stock companies; 3, policies of insurance; 4, unliquidated claims of every nature, with the estimated value.

Descriptions.	Value.
1. Open account against Joseph M. Strong, of New York city, worthless; Strong has obtained a discharge in bankruptcy, about $15,000.00	0 00
2. Open account against R. C. Winterhoff, of New York city, for about $12,000.00; Winterhoff died insolvent	0 00
3. Open account against the Iron Hills Insurance & Mining Co. of Kentucky for services and money advanced, about 6,000	0 00
4. 400 shares of stock of Kentucky Improvement Co., a corporation under laws of Kentucky, of full value, $40,000	0 00
5. 250 shares stock of Iron Hills Florence [Insurance] & Mining Co., a Kentucky corporation, of full value of $25,000.00	0 00
6. 3,700 shares of Fisher Iron Co., a New York corporation, of par value of $37,000.00	0 00

11 It appeared that no reference was made anywhere in said Ellis' schedules in bankruptcy to any policy of insurance.

The plaintiff also introduced in evidence a certified copy of an assignment made by the register in bankruptcy of said Ellis' estate to Horace W. Bates, assignee, dated August 6, 1878; also a certified copy of an assignment dated June 9, 1882, made by the register in bankruptcy of said Ellis' estate to the plaintiff, Wm. W. Cleary, appointed assignee in the place of said Bates, resigned.

The plaintiff also read in evidence the deposition, taken in his behalf at Hartford, Connecticut, of John M. Taylor, of said Hartford, secretary of the Connecticut Mutual Life Insurance Company, who testified on direct examination that he had been connected with that company since August, 1872; that the directors and officers had charge of the books and vouchers, and that he as secretary had

special charge of them; that said company issued three policies to said Ellis upon his own life, numbered 68428 and 68429, March 2, 1867, in the sum of $10,000 each, and No. 68430, upon the same date, in the sum of $5,000; that No. 68430 had been surrendered to the company for its value, to be applied in payment of premiums on Nos. 68428 and 68429; that said Ellis, May 19, 1877, assigned the policies to E. Rollins Morse, of Boston, in trust for his daughters Helena Forsyth Ellis and Marie Louise Ellis; that after said Ellis' death and pending the settlement of the policies said Morse notified the company that he had no interest in or claim to the same, viz., Nos. 68428 and 68429. A copy of policy No. 68428 is hereto annexed, marked Exhibit A. Neither the original nor a copy
12 of policy 68430 was introduced in evidence. A copy of said assignment to said Morse was annexed by said Taylor to his said deposition and is hereto annexed, marked Exhibit B. Said Taylor also testified on direct examination that proofs on policy No. 68428 were furnished and claim made by the defendant as administrator of the estate of said Ellis; that the annual premium in 1879 was paid in cash from the proceeds of policy No. 68430 on the life of said Ellis, which was surrendered and the value thereof applied for that purpose, as appeared by the original policy on file in the office of the company, and the release thereof for cash value to apply, dated March 1, 1879, signed by said Ellis and E. Rollins Morse, trustee, a copy of which release was annexed to said deposition and is hereto annexed, marked Exhibit C; that the company had no knowledge of the bankruptcy of Ellis shortly prior to his death; that it paid the claim on No. 68428 to Edward Avery, as it was satisfied his claim was valid, and the original policy was duly discharged and released.

That the annual premium on policy No. 68428, in March, 1879, was paid by part of the surrender value of policy No. 68430, and the balance of money or credit, after said payment of premiums, was paid to Edward Avery, administrator of the estate of Matthias Ellis, being $258.21.

It also appeared that said Ellis died Nov. 21, 1879, and that said E. Rollins Morse wrote to said insurance company a letter, a copy of which is hereto annexed, marked Exhibit D, and that said insurance company paid to said Edward Avery, as administrator of the estate of said Ellis, on Dec. 31, 1879, $9,390.43 upon said policy No. 68428 and the balance of the surrender value of policy No. 68430, viz., $258.21, & that on that day the said Avery, as adminis-
13 trator of the estate of said Ellis, receipted to said insurance company for those sums.

Said Taylor, on cross-examination, in his said deposition testified that he declined to annex the original assignment to said Morse of said policies, stating as the reason that it was not in accordance with their rules of business to part with their original vouchers, and that it was his duty to observe and enforce that rule, and that he declined to annex said original receipt for the value of policy No. 68430 for the same reason.

The plaintiff also read in evidence the deposition, taken in his

behalf, at Covington, Kentucky, of Horace W. Bates, the first assignee of the estate of said Ellis in bankruptcy, & he, said Bates, testified on direct examination that he was acquainted with said Ellis for some twelve years; that said Ellis was adjudged a bankrupt in the district court for the State of Kentucky, & that he, the witness, was the Horace W. Bates who was appointed assignee and accepted the appointment; that no assets of value came to his hands as assignee, and that none were disclosed as being the property of said Ellis; that said Ellis did not turn over to him any policies of insurance of any kind; that said Ellis did not give him any information after filing his petition in bankruptcy as to having any insurance; that some time previously said Ellis had informed him that he, Ellis, had not been able to keep up his premiums on his life insurance, giving him, the witness, the impression that in consequence such policies lapsed; that at or about the same time he, the witness, learned indirectly that an assignment of some policy or policies had been made to E. Rollins Morse, of Boston.

14 That after the filing of the petition in bankruptcy he, the witness, asked said Ellis if there was any property in Massachusetts which should be brought into the proceedings, to which reply was given that there was no property which was in his (Ellis') control; that, supposing all life insurance policies had lapsed or been assigned and passed from the control of said Ellis, he, the witness, did nothing in relation to said insurance; that no assignment, transfer, or release of any assets was ever made by the witness; that the first information witness had of the existence of any policies in which said Ellis had any interest was some months after the death of said Ellis; that witness did not remember from whom such information was learned; that he, the witness, made no assignment & gave no authority to any one to collect any proceeds of life insurance, nor made any transfer of any claims of any kind while acting as assignee; that he, witness, knew the defendant but slightly; did not remember having seen him since Ellis' death, & had had no communication with him, written or verbal.

On cross-examination the witness testified in his deposition that he had since Dec., 1879, received letters from Joseph Pratt, perhaps three or four; that he could not annex them to his deposition, as he did not keep them; that after replying to the letters received he destroyed them, as it is not his practise to keep letters which he does not at the time deem important; that he knew that said Ellis had insurance on his life to a large amount, taken about 1864 or 1865; that he knew that the premiums on said life insurance, amounting to some $1,500 per year, were kept paid up to about 1872 or 1873; that after that time he, witness, knew of Ellis' financial

15 troubles to some extent, and his, witness', belief was, as before stated, that his, witness', understanding from said Ellis was, after learning of the assignment to E. Rollins Morse, that such policy or policies had some time previously passed from his control and were not a part of his assets in bankruptcy; that from such information as he, witness, received he concluded there was no value to the creditors in such policy or policies; that his suppositions were,

further than before stated, that such policies as were original were for a valuable consideration, as he, witness, knew of Ellis making drafts upon E. Rollins Morse; that his, witness', supposition was that all of said policies had either lapsed for non-payment of premium or had been assigned beyond his control; that he, witness, supposed he had assigned policies to a small amount, as stated; that he did not suppose that his, Ellis', daughters had any interest in any policies of insurance, and that the witness had not reason to believe that there remained any insurance belonging to Ellis or his estate; that the witness' recollection was that said Ellis' life insurance, when taken about 1864 or 1865, was nearly or quite one hundred thousand dollars; that he knew of fifty thousand dollars being taken at one time, & that he thinks more was afterwards taken; that he knew of said Ellis paying his premium on his life insurance up to about 1873, possibly 1874, as he, witness, furnished him money which he, Ellis, said was to be used for that purpose, but that witness does not know that it was so used; that after that time witness was quite well acquainted with said Ellis' business affairs and knew of his inability to maintain the large payment necessary to keep the policies in force; that wit-
16 ness cannot fix upon any special conversation with said Ellis as to such matters nor fix any date, as he saw him very frequently for some two years before his bankruptcy; that witness did not remember the exact year of said Ellis' death; that his first information of it was from a Plymouth paper at the time; that witness did not then suppose that he, Ellis, had any life insurance which would benefit his daughters, or, indeed, any property of value; that witness supposed that such policies as had been assigned had been in effect sold or pledged for money, which he, Ellis, had received and spent; that witness' first information as to the daughters of said Ellis receiving any insurance money from E. Rollins Morse was, witness thought, from the letter received from Joseph Pratt; that witness did not then suppose such money had been assigned to said Morse for their benefit; that witness' supposition and belief, derived from his general knowledge of Ellis' affairs, was that said Morse had furnished said Ellis money, and as a pledge for it, or possibly by a direct purchase, had taken a certain amount of insurance, taking the chance of Ellis living or dying; that witness' supposition further was that by reason of said Ellis' death the policies became payable, which repaid Morse for his payments, and that he turned over to said Ellis' daughters the part remaining, it being understood generally that they were left without means.

The plaintiff also introduced in evidence the petition of def't to the probate court, Plymouth county, Massachusetts, to be appointed administrator of the estate of said Ellis, dated Nov. 28, 1879, and his appointment as such administrator Dec. 8, 1879; also the
17 warrant to three appraisers to appraise the estate, dated Jan. 15, 1880; the inventory returned by the defendant as administrator into said probate court Nov. 8, 1880, which inventory showed the personal estate to be appraised at $13,888.30 and no real

estate, and as embraced in the personal estate this item, to wit: "Proceeds of life insurance, cash on deposit, in Boston, $13,157.43."

The plaintiff also introduced in evidence the representation, dated and sworn to Dec. 3, 1880, made by the defendant in said probate court of the insolvency of the estate of said Ellis, deceased, by which it appeared that the debts claimed against the estate of said deceased were $22,482.89, & that the personal estate by the inventory was $13,888.30, other personal estate not in inventory $24.48, making as the total estate $13,912.78, and showing an insufficiency of assets to pay debts, funeral expenses, & charges of administration by $9,765.11; also the appointment by said probate court on the fourth Monday of Aug., 1881, of two commissioners to receive and examine claims of all creditors against the estate of said Ellis, deceased, & to return a list of all claims laid before them, with the sum allowed on each claim; that said commissioners were sworn Sept. 12, 1881, and filed their report in said probate court April 24, 1882, showing the amount of debts allowed by them against the estate of said deceased as $4,887.70 & as disallowed $22,353; also a claim filed August 28, 1882, in the probate court by the plaintiff claiming, as assignee in bankruptcy, all the assets set forth in said inventory.

E. Rollins Morse's testimony was introduced by the plaintiff & was on direct examination as follows, viz: That he had been in business in Boston for about 20 years; that he was a banker from 1872 until 1882 on State St., in Boston; that he had known said Ellis since about 1863 or 1864; that he knew Ellis had some interest in some either iron mines or hills in the West; did not know whether it was in 1873; should say it probably was, and that was his chief business or interest that witness knew; that when Ellis was in the East he was apt to come into the witness' office and see him, not on business, but he was apt to drop in, and from time to time left papers with the witness for care and safe-keeping very frequently; that witness always had one envelope where he used to put them, marked with Ellis' name, in witness' own private trunk; that it never was understood that he, witness, was to examine them necessarily; that witness looked upon it that he had a right to do it if he wanted to, but he very seldom did it, and that he did not know that he ever did it; that he, witness, remembered seeing an assignment of a policy in the Mutual Benefit, he thinks it was; that he thinks he did see one assignment, don't think he ever had custody of it, but thinks he did see one that he, Ellis, had made out — policy in the Mutual Benefit Life Insurance Co., which he, witness, subsequently collected; that is the only one he ever remembered of having had or seen; did not remember the number of it; that the amount he, witness, collected in cash on it was about $16,000; that the policy had been changed from time to time, and that he did not remember what it originally was; that it had to be marked down to keep it alive; that he did not think that he ever had in his possession, or seen or handled, a paper purporting to be the assignment of 3 policies of insurance in the Connecticut Mutual Life Ins. Co. on the life of Matt. Ellis; that he did not remember of ever having seen it or had it; that the first time he knew or had

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reason to believe that such a paper was in existence was when
19 he was called upon by Mr. McFarlane, who said that the company declined to pay him the money on the policy that had been assigned to him unless he (witness) stated that he (witness) had no claim under that policy; that this was after the death of said Ellis; that McFarland came as representing the Ellis Foundry Co.; that witness did not know what his official capacity was, whether he was president, treasurer, or general manager, but that he represented that company; that this was a very short time after said Ellis' death, so that the reason assigned was that they wished to put the claim in within the 60 days, and that they wanted him (witness) to write that letter (Exhibit D); thinks within 60 days, but that it may have been that the application was made, and that they asked witness to put it in, in order that they might complete it; that at that request he, witness, signed a letter; that witness did not remember before that day on which he signed that letter of having any knowledge that there was any assignment of these policies to him anywhere; that he did not think he could have; that he could not remember about the amount of insurance of that policy that McFarland called his attention to; that he should have said that there was more than one policy; that he should have said there were three, if he was not mistaken, but that he could not remember positively about that, it was so long ago; that he did not put it specially in his mind to keep it, because he did not expect to have to think of it again; that he thought there were three policies, of $5,000 each, but, as he said, he might be mistaken; that he could not be certain about his mentioning a policy of $10,000; that he had not at any time been shown any paper purporting to be an assignment of 3 policies from Matthias Ellis to him; that he had never been shown anything of the kind that he remembered; that it
20 was so long ago that he may have forgotten it; that he really could not say whether he ever had anything to do with taking any active part in handling or have anything to do with more than one policy on the life of Matthias Ellis; that yes he thought he did; that he thinks he had more than one policy at one time; that they varied greatly, because at one time he (Ellis) was unable to pay the premiums and "we" were obliged to change them about, so that he (witness) thought he did have more than one policy in the beginning; that he thinks the policy he (witness) collected under was originally two policies, and that it had been changed perhaps two or three times, twice certainly; that he (witness) a number of times, at the request of said Ellis, did something in relation to the surrendering of a policy; that he (witness) signed several papers that he, Ellis, brought in when he took the policies; that when he, Ellis, originally took the policies he used to pay in cash, and then certainly once, and he (witness) thought twice, when he took them he was going to reduce the first value in order to pay the premium on them; that those papers he (witness) signed in connection with them; that witness did not undertake to examine with any care at all any paper when he signed it, to canvass it as he did with his (witness') own transactions; that the money that he (wit-

ness) collected after the death of said Ellis, as well as he could remember, he collected from J. B. Kniver, on State street, just between Devonshire & Washington St., the Mutual Benefit of New Jersey; that that was where he collected the money; that he held there two policies, he thinks, and received them from Mr. Ellis; that he (witness) held them in conjunction with the trust which had been created some time before and which he, Ellis, wished to have
21 those added to; that he could not fix the time or how long that trust had existed, but that it started a great many years prior to said Ellis' death, he should think; that it was not by Mr. Ellis, but by a friend of Mr. Ellis, for the benefit of his children; that it was the Hovey trust, for the benefit of Mr. Ellis' two children, and that it had existed for many years, and that this policy or these two policies, that came into his hands & afterwards collected the money on, were policies that Mr. Ellis had handed to him with the request that he (witness) should add it to that trust, and that witness did so; that he collected the money of the Mutual Benefit of New Jersey; that he never entered into any agreement with Mr. Ellis for any other trust than what he (witness) had mentioned; that he never accepted any other trust for Mr. Ellis than the one he (witness) had mentioned; that he did not know the standing of Mr. Ellis or his reputation for credit in 1877 or a long there for some years; that he had no business transaction with him at that time at all; that he (witness) had no recollection at all of the original of which Exhibit C is a copy; that he signed it at said Ellis' request; that he could not say it had anything to do with the trust he had spoken of; that if he signed it "E. Rollins Morse, trustee" he supposes that he was under the impression that it was, but that he signed a great many papers at that time without knowing of course or examining sufficiently (after examining Exhibit C); that he cannot connect it with the Hovey trust; that he (witness) had not been able to find any memorandum of any policies in the Connecticut Mutual Life Ins. Co.; that he had looked for the purpose of finding them if he could, but not recently; that when this matter was first presented he did; that he looked over all his memoranda or documents to see if he could find anything which would
22 entitle him to retain those policies at that time, and never found out so much as he had since he came into the court-room; that he found no memorandum of anything of any kind in any shape or manner; that after the death of said Ellis he (witness) wrote that letter to which he refused [referred] a short time ago to say that he made no claim against the company.

On cross-examination this witness' testimony was that he did not pretend to say that he had any distinct recollection as to the number of papers Mr. Ellis handed to him from time to time in his lifetime; that he did not think that said Ellis ever handed him any assignment; that he does not think that he handed him the assignment in the New Jersey Mutual; that he thinks he merely showed it to him and said that he was going to take it to the office of the company; that he had no recollection as to how many policies of insurance he ever had in his possession from Matthias Ellis; that he cannot tell cer-

tainly; that he is very certain that he had more than one; whether more than two or three he could not say at all; that he does not remember; that he has memory now as to the office the one he collected was in, but not the others; that he don't know that he had any others; that he does not recollect whether he did or not; that he don't recollect anything about it; kept a memorandum from time to time of papers he, Ellis, brought him for that trust, but not all that he brought to him for safe-keeping, until he came again; kept them all in the same box that he referred to before—the Hovey trust and the other papers; that he had no doubt at all that he signed the receipt (Exhibit C) if the Connecticut Mutual say that they hold such a paper. Before this was called to his attention had no recollection of signing such a paper; had no memory as
23 to the exact papers; that he knew that he signed several papers in connection with several companies; that he has an idea that he signed that paper without reading it; that he sometimes signed papers without reading them; that it is not his habit with his own business; that when it does not affect his own business he sometimes does; knew that it would not affect his own business from the printed part of the paper; that he could see what it was; if they say that his signature to that paper is a genuine signature it is very probable; that he should not think anybody would commit forgery, and should not dare to testify that he thought so; can give no idea of the number of papers which Matthias Ellis from time to time brought to him and which he put in that box; that he could not tell at all; that he had not the slightest remembrance; that he took no memorandum of it; they were in his (witness') safe; they were not put in a private box that he, Ellis, had a key to, but in a private box of his (witness') own in his safe; the box had a lock to it; said Ellis did not have a key to it, and he, witness, had the key to it; that he did not swear that the assignment of these three policies of the Connecticut Co. was never in that box; that he had not been asked to swear to that; that all he means to say is that he don't remember it; that it is very difficult to remember so many years back; that he did not recollect Mr. Ball (defendant's counsel) coming to see him to ascertain what he knew on the subject until he, Mr. Ball, spoke of it; that he remembers now that he, Ball, came in and told him (witness) who he, Ball, was, & that witness told him that he had known him a great many years; that he did not remember the interview with said
24 Ball until he, Ball, mentioned it a few minutes ago; that he don't know whether this interview was two years or five years ago; that it was after Mr. Ellis' death; that at that interview he substantially told said Ball that he had forgotten and did not remember anything about the matter; that he don't think that he went so far as to say that his memory was a blank; that he said that he did not recollect distinctly about it; that he has already said that he has no recollection of any assignment, but thought he had seen one of another company; that he does not mean to swear that that assignment (Exhibit B) was not in his possession; that he had not sworn that yet; that he had stated that he would have had no

recollection of signing said receipt (Exhibit C) if his attention had not been called to it; that he has no recollection at all, even now that he has seen it.

On redirect examination the testimony of this witness was that the paper of which Exhibit D is a copy was in his handwriting; that he wrote it at the request of Mr. McFarland; that of course he could not remember definitely to whom he delivered that paper after he signed it, but he should say that Mr. McFarland waited until he wrote it and took it, but that he was not at all certain about it; that he had no recollection of ever himself sending to the Connecticut Mutual Life Ins. Co. any assignment of the policies—ever sending for record any assignment that Ellis had made to him.

On recross examination his testimony was that he had no remembrance of sending any assignment at all to the Connecticut Mutual Life Ins. Co.; that he could not say that he remembered that he did not; that he presumed that he had no recollection on the
25 subject, either one way or the other, whether he did or did not; that he certainly does not remember of sending any; that he has stated that he cannot swear positively that he did not send the assignment of these policies to the Connecticut Mutual Life Ins. Co., but that his remembrance is that he has no remembrance of sending it; that he does not swear that he did not have the assignment, and that he does not swear that he did not send it.

Robert M. Pratt, called as a witness by plaintiff, testified that he knew said Ellis for 10 or 15 years, & had many transactions with him before 1871; was a creditor of said Ellis at the time of his bankruptcy; that the amount of his claim was $37,299.51 Jan'y 1, 1869, & there had been an indorsement Dec. 15, 1875, of $5 as paid; that he had undertaken to collect the claim; don't know that he tried to collect it after 1869; did not suppose he, Ellis, could pay it; that his, Ellis', financial credit was poor; that he had no means, to witness' knowledge, to pay it, and that continued to be the case to time of his death.

Samuel Little, called as a witness by plaintiff, testified that he was president of the Rockland National Bank; that the bank held notes against Ellis as follows: One of July 28, 1870, on 6 months, for $1,873.17; one of Aug. 18, 1870, on six months, for $3,500; one Sept. 26, 1870, on six months, for $2,187, and one of Nov. 21, 1875, for $3,000; all were signed by Matthias Ellis, & they had compared in part by Pratt & Wentworth, the indorsers; that said Ellis had paid nothing on them; that his reputation for financial ability was bad enough with "us."

Wm. Pratt, called as a witness by plaintiff, testified that he was acquainted with said Ellis; that witness, as executor of the
26 estate of George W. Pratt, had dealings with said Ellis; had a note against him dated Oct. 1, 1874, for $3,815.54; had made demand frequently on said Ellis for payment, & his answer was that nothing could be done; did not consider his reputation for credit good.

Plaintiff also put in evidence a certified copy of judgment recovered in supreme court by George M. Hobbs, plaintiff, against Mat-

thias Ellis, def't, Oct. 21, 1871, for $44,227.80 and two executions upon it, the last execution being for $34,000 and unsatisfied; also copy of judgment recovered by Gerard C. Tobey, administrator, against said Ellis, Dec. 30, 1873, for $4,553.79, and certificate that execution had been issued thereon Jan'y 7, 1874, and never returned to the files of the court.

Joseph Pratt, a witness called by plaintiff, testified that he knew said Ellis, & had known him forty years; that somewhere from 1868 to 1870 he indorsed a note of $3,000 for said Ellis' benefit, & he, Ellis, did not pay it; witness had to pay it; that he, Ellis, also owed the witness on joint account $8,000 to $10,000, contracted from 1865 to 1870; that he, Ellis, also owed witness' wife, who was said Ellis' sister, $40,000; knows he did not pay any of it. He, Ellis, said he could not pay, & that witness knew if he could pay he would. He told witness that witness made him sick by pressing him so vigorously; that he thinks from 1870 to 1877 his, Ellis', credit was very bad, but up to 1870 he did not know but what it was good. This witness also testified that he wrote to the assignee in bankruptcy, Horace W. Bates, nothing about the policies of life insurance until after March, 1882, until after he had an interview with Eugene M. Johnson, Esq., in respect to the subject. (The first interview which he had with said Johnson on the subject was afterwards fixed as occurring on March 17, 1882.)

27 The defendant introduced in evidence the bond given, with 2 sureties, by said Avery, as the administrator of the estate of Matthias Ellis, deceased, to the judge of probate for the faithful discharge of his, said Avery's, duties as administrator, approved by the judge of probate Dec. 8, 1879, and also proved that said Avery gave o[illegible] notice of his appointment as such administrator.

The defendant also introduced in evidence the letter of guardianship issued by the judge of probate for the county of Plymouth, dated Dec. 8, 1879, duly appointing Edward Avery guardian of Helena F. Ellis and Marie L. Ellis, the two daughters of said Matthias Ellis, minors.

Edward Avery, the defendant, called in his own behalf as a witness, testified on direct examination that he never withheld in any way or concealed or attempted to conceal the fact that he had received the proceeds of these policies of insurance; that he could not say that he had the letter of Dec. 29, 1879, from E. Rollins Morse to the president of the Connecticut Mutual Life Ins. Co. in his, the witness', possession any length of time; that he saw it, was cognizant of the writing of it, and the delivery of it to the company; that there was something passed between him and E. Rollins Morse in respect to the subject-matter of that letter, whether in regard to that particular letter or not he, witness, did not know, but as to the subject-matter out of which that letter grew, in regard to his, Morse's, trusteeship & his disclaiming any claim; that he, witness, called on said Morse in regard to the trust, had a conversation with him, and he, Morse, referred witness to his, Morse's, brother, John T.

28 Morse, Jr., a lawyer, with directions or instructions to consult him, and that whatever conclusions Mr. John T. Morse,

Jr., and witness reached in regard to his, E. Rollins Morse's, duty in the matter as trustee he would perform and carry out; that thereupon he, witness, called upon Mr. John T. Morse, Jr., and he, witness, and John T. Morse, Jr., had several interviews; that he, witness, had not an absolute recollection, but still so very strong an impression that he should put it as next to an absolute recollection, that the conclusion they reached was communicated to Mr. E. Rollins Morse; that under the assignment he, E. Rollins Morse, was simply a naked trustee, with authority perhaps to collect, but that immediately upon collection, at the request of the *cestuis que trust* or their guardian, he would be required to pay it over to them, and that the question was whether it was advisable for him to go through the form of collection and then turn it over to witness in his position of guardian of the children, or whether he, E. Rollins Morse, would release, abandon any claim under his assignment; that Mr. John T. Morse advised the latter course; he, witness, concurred in it, and the result of that was either this identical letter or a release of all claim under the assignment.

On cross-examination this witness testified that he was appointed administrator, gave his notice and gave his bond, & then he thinks that policy No. 68428 was brought to him by Mr. Pratt; that he was not quite sure of the date, but that that was his recollection, and that was the first he saw of it after Mr. Ellis' death; that that is his recollection; that he had not the slightest recollection whether he left it with him when he brought it the first time, but naturally supposes so; that he has not the slightest recollection whether
29 he did or did not; that he, witness, knows that he had the possession of it; that he has a very distinct recollection of the policy being brought to him after his appointment; that he has a distinct recollection that he took that policy & that he gave notice; that he saw E. Rollins Morse, that he saw John T. Morse, & that he had interviews with Mr. McFarland; that he can't say whether he ever showed that policy to E. Rollins Morse; that he did to John T. Morse, but that he can't say as to E. Rollins Morse; that he has not any recollection of making the proof of loss; that he has not any recollection who sent the policy to Connecticut; that he did not send it; if he was to give the best of his recollection he should say he never sent it; that he don't remember sending that policy to Connecticut himself; that he don't think it was ever sent to Connecticut; that he don't recollect sending the proofs of loss to Connecticut; that he had nothing to do with them; that he has no recollection one way or the other whether the interview with E. Rollins Morse was after the proofs of loss had been sent to Connecticut; that he learned at some time that there was a paper, purporting to be an assignment or the record of an assignment, at the office of the company in Connecticut, but that he can't say yea or nay to the question whether he was informed of it before he went to E. Rollins Morse.

It was admitted that said E. Rollins Morse signed the papers, copies of which exhibits, marked C and D respectively, are hereto annexed.

It was agreed by the parties that at the time of the filing by said Ellis of his petition in bankruptcy the cash surrender value
30 of said policy No. 68428 was twelve hundred dollars. The foregoing evidence is all the evidence which was introduced by either party that is material.

The defendant asked the court to rule that this action was barred by the State statute of limitations, not having been commenced within two years from the time the cause of action accrued, unless the defendant fraudulently concealed the cause of action from the knowledge of Bates, the first assignee, the defendant citing and relying upon the provisions of sections 3 and 14 of chapter 197 of the Public Statutes of Massachusetts, re-enacting the provisions of section 2 of chapter 155 of the General Statutes of Massachusetts as amended by chap. 177 of the Acts of the Legislature of Mass. in the year 1861, and re-enacting the provisions of sec. 12 of said chapter 155 of the General Statutes.

The defendant also asked the court to rule that this action was barred under the provisions of section 9 of chapter 136 of the Public Statutes of Massachusetts, re-enacting the provisions of section 5 of chapter 97 of the General Statutes of Massachusetts, because not commenced within two years from the time defendant gave bond for the discharge of his trust of administrator.

The defendant also asked the court to rule that this action was barred by the provisions of section 5057 of the Revised Statutes of the United States, being the limitation of two years contained in the bankrupt law of the United States, unless the defendant fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of the defendant
31 to disclose to Bates, the assignee, the facts would not amount to a fraudulent concealment.

The defendant also asked the court to rule that mere ignorance on the part of the assignee in bankruptcy of the cause of action would not take the case out of the statute of limitations.

The defendant also asked the court to rule that if the assignee in bankruptcy had the means of ascertaining the facts and he, through neglect or negligence on his part, omitted to avail himself of these means it is the same thing as if he had knowledge of the facts.

The defendant also asked the court to rule that if E. Rollins Morse received the assignment made by Ellis to him of the three policies, No. 68428, 68429, and 68430, without objection at the time to acting as trustee under the assignment, this would constitute an acceptance by him of the office of trustee under the assignment; that if he received the assignment and acted in any way as trustee under it he must be held to have acccepted the office of trustee under it, and that had he declined or refused to accept the trusteeship under said assignment, the trust created by it for the benefit of the danghters would not thereby be defeated or failed; that said Morse could not, after the death of said Ellis, by refusing to claim or by disclaiming any interest in the policies affect the rights of the daughters under the trust created for their benefit, and that his

letter of Dec. 29, 1879, to the president of the insurance company could not vest the policies in the assignee in bankruptcy.

The defendant also asked the court to rule that the assign-
32 ment in bankruptcy to Bates did not vest in him any interest in the policies, as he had no insurable interest in the life of the bankrupt, and also to rule that any assignment of the policies by the assignee or by any other person to one having no insurable interest in the life of the bankrupt would be invalid and convey nothing.

The defendant also asked the court to rule that if the assignment was made to Morse without any valuable consideration, and Ellis was insolvent at the time when he made it, that would not enable the assignee in bankruptcy to avoid the assignment, except to the extent of the value of the policies at the time of the assignment.

The defendant also, in case the court ruled that the plaintiff was entitled to recover, asked the court to rule that all that the plaintiff was entitled to recover in respect to policy No. 68428 was the surrender value of it at the time of the filing by said Ellis of his petition in bankruptcy; but the court refused to give any of the rulings asked and ruled to the jury that the plaintiff was entitled to recover the amount claimed by him, viz., said several sums of ninety-three hundred and ninety dollars and forty-three cents and two hundred and fifty-eight dollars and twenty-one cents, and interest on each from the date of the writ, and directed the jury to render a verdict for the plaintiff accordingly, and the jury did render a verdict for the plaintiff accordingly in the sum of eleven thousand five hundred and thirty-nine dollars and fifty-six cents. The defendant duly excepted to the refusal of the court to give the rulings asked by him and to the ruling and direction given by the court to the jury. The defendant, being aggrieved by said refusal to
33 give the rulings asked by him and by the ruling and direction given by the court, presents this his bill of exceptions and prays that the same be allowed.

EDWARD AVERY,
Administrator,
By JOSHUA D. BALL,
His Attorney.

The foregoing bill of exceptions, being conformable to the truth, is by me, the judge presiding at the trial, allowed as of January 7th, 1886, and as during the trial and before the retirement of the jury.

G. M. CARPENTER, *J.*

The following is a copy of the policy of insurance annexed to defendant's exceptions and marked "A:"

EXHIBIT "A."

Connecticut Mutual Life Insurance Company of Hartford, Conn.

No. 68428.

This policy of insurance witnesseth: That the Connecticut Mutual Life Insurance Company, in consideration of the declaration and

representations made to them in the application for this insurance and the sum of three hundred and forty-four dollars and ninety cents to them in hand paid by Matthias Ellis, of Carver, Mass., and of the annual premium of three hundred and forty-four dollars and ninety cents, to be paid on or before the second day of March in every year during the continuance of this policy, do assure the life of Matthias Ellis, of Carver, in the county of Plymouth, State of Massachusetts, in the amount of ten thousand dollars, for the term of the whole continuance of his life.

Annual premium, $344.90.

34

And the said company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly — pay or cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Matthias Ellis, deducting therefrom all notes taken for premiums unpaid at that date.

Term of life.

Sum insured, $10,000.

And it is hereby conditioned and agreed that if at any time after three premiums have been paid on this policy it shall be surrendered while yet in force the company will issue a paid-up non-forfeiture policy therefor for such an amount as the then present value of this policy would purchase as a single premium: Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, That in case the said Matthias Ellis shall die upon the seas or shall, without the consent of this company previously obtained and endorsed upon this policy, pass either by sea or land beyond the settled limits of the United States (excepting by land or on lakes and rivers into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude between the first of June and the first of November, or shall, without such previous consent thus endorsed, visit California or Oregon or pass into the Territories of the United States lying west of the twenty-first meridian of longitude from Washington, or shall, without such previous consent thus endorsed, enter into any military or naval service whatever (the militia not in actual service excepted), or shall, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as fireman or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, or in case he shall become so far intemperate as to impair his health or induce delirium tremens, or shall die by his own hand or in a duel or in consequence thereof, or by the hands of justice or in the known violation of any law of the States or the United States or of any government where he may be, this policy shall be void, null, and of no effect.

35

And it is also understood and agreed to be the true intent and meaning hereof that if the proposals, answers, and declaration made

by the said Matthias Ellis and bearing date the second day of March, 1867, & which are hereby made part & parcel of this policy
36 as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void, or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured or any part thereof and this policy shall cease and determine.

And it is further understood and agreed that this policy shall not take effect and become binding on said company until the premium above named shall be actually paid to said company or to some person authorized by them to receive it.

And it is further agreed that in every case where this policy shall cease or become or be null and void all previous payments made thereon and all dividend credits accruing therefrom shall be forfeited to the said company.

In witness whereof the said Connecticut Mutual Life Insurance Company have, by their president and secretary, signed and delivered this contract in the city of Hartford this second day of March, one thousand eight hundred & sixty-seven, but the same shall not be binding until countersigned by W. S. Dunham, agent at New York, N. Y.

GUY R. PHELPS, *President.*

W. S. OLMSTED, *Secretary.*

Countersigned at New York this seventh day of March, 1867.

W. S. DUNHAM, *Agent.*

37 Acceptance of the premium due on this policy by the company or its agents after the day upon which it is due must be considered as acts of grace or courtesy, & in nowise to be construed as forming a precedent for future payments or a waiver of the forfeiture of the policy, according to the conditions therein expressed, if any future payment of premiums be omitted on the day it falls due.

Agents of the company are in no case authorized to make, alter, or discharge contracts or waiver forfeitures.

The annual premium reduired to continue this policy in force must be paid on or before the date of the same, or the insurance ceases and the policy is void. The only evidence of payment of such premium which will be acknowledged by the company as valid & binding is a certificate of renewal, signed by the secretary of the company; certificates for this purpose will be furnished (for delivery to policy-holders) to those agents of the company who are authorized to collect premiums on account of the company; but as such authority is liable to frequent changes & subject to be revoked without the knowledge of the insured, and as persons not so authorized may solicit payment of premium, representing that their receipt or endorsement will renew the policy, the policy-holders are cautioned not to pay renewal premiums to any person except upon

delivery of a renewal certificate issued from the office of
38 the company, signed by the secretary. This caution is important to policy-holders to prevent payments being made to irresponsible persons or those not authorized by the company to receive them, thereby not only losing the money paid, but forfeiting the insurance also.

For the convenience of policy-holders these renewal certificates will be furnished to the agents through whom the policy was issued or at the location where it was last renewed, to be delivered upon the payment of the premium unless otherwise directed by the insurer; but the possession of the renewal certificate is the only evidence to the policy-holder of the authority of the agent to receive the premium.

Proofs of Deaths Required.

1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death.

2nd. A certificate of a disinterested acquaintance of the deceased certifying to the time and fact of his death, & that he or she was the person insured by that name in this company.

3rd. A certificate from the undertaker, sexton, or clergyman who officiated at the funeral of the deceased & saw the body interred.

4th. A certificate from some intimate friend of the deceased, of the age of the party at the time of his death.

39 These several certificates should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation.

No. 68428.

The Connecticut Mutual Life Insurance Company of Hartford, Conn.

Assurance on the life of Matthias Ellis. Amount, $10,000.

Date, March 2, 1867.	
Term of life.	
Annual premium	$344 90
Extra do.	
When due, 2 March.	
Cash part of payment	
Policy	1 00
Amount of note	
	$

EXHIBIT B.

In consideration of one dollar to me paid by E. Rollins Morse, of Boston, the receipt of which is hereby acknowledged, I hereby transfer, assign, and set over to said E. Rollins Morse three policies of insurance on my life, insured by the Connecticut Mutual Life Insurance Company, dated March 2, 1867, and numbered, respectively,

68428, 68429, & 68430, Nos. 68428 & 68429 being for the sum of ten thousand dollars each and number 68430 being for the sum of five thousand dollars; and also all profits, dividends, non-forfeiture policies, money, or other property that may arise from or be paid for or on account of said policies; to have and to hold the same unto the said Morse, but in trust, nevertheless to pay over the income,
40 profits, or proceeds of the said policies to my two daughters, Helena Forsyth Ellis and Marie Louise Ellis.

In witness whereof I have hereto set my hand and seal this nineteenth day of May, A. D. 1877.

MATTHIAS ELLIS. [SEAL.]

Witness:
GEO. M. HOBBS.

EXHIBIT C.

Received of the Connecticut Mutual Life Insurance Co. of Hartford, Conn., the sum of ten hundred and fifty-four dollars, which is hereby acknowledged as a full consideration and satisfaction for all claims and demand which we have or may have under or on account of policy No. 68430, released, quitclaimed, surrendered, and discharged to said company, said amount having been applied as follows:

In payment of 1879 premiums on policies Nos. 68428 & 68429	$495 20
Applicable in payment of future premiums on the same	249 28
In cancellation of premium note or credit	292 00
In cancellation of accrued interest on the same	17 52
Total as above	$1,054 00

MATTHIAS ELLIS.

Dated at Boston this 1st day of March, A. D. 1879.

E. ROLLINS MORSE, *Trustee.*

In the above margin is the following:
Receipt for value to apply.

41 EXHIBIT D.

BOSTON, *Dec. 29th*, 1879.

DEAR SIR: I find no assignment to me of policies Nos. 68428 and 68429 on the life of Matthias Ellis issued by your company, and I do not claim any interest in the same.

Yours resp'y, E. ROLLINS MORSE.

To the president, &c., of the Connecticut Mutual Life Ins. Co. of Hartford, Conn.

A true record.
Attest: —— ——, *Clerk.*

42 *Assignment of Errors.* (*Filed Jan.* 30, 1886.)

And now comes Edward Avery, administrator, the defendant in the above-entitled action, and assigns as errors the following, to wit:

First. That the court should have ruled that this action was barred by the State statute of limitations, being sections 3 and 14 of chapter 197 of the Public Statutes of Massachusetts (not having been commenced within two years from the time the cause of action accrued), unless the defendant fraudulently concealed the cause of action from the knowledge of Bates, the first assignee; whereas the court refused so to rule.

Second. That the court should have ruled that this action was barred under the provisions of sec. 9 of chap. 136 of the Public Statutes of Massachusetts, not having been commenced within two years from the time defendant gave bond for the discharge of his trust as administrator; whereas the court refused so to rule.

Third. That the court should have ruled that this action was barred by the provisions of sec. 5057 of the Revised Statutes of the United States (being the limitation of two years contained in the bankrupt law of the United States), unless the defendant fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of the defendant to disclose to Bates, the assignee, the facts would not amount to a fraudulent concealment; whereas the court refused so to rule.

Fourth. That the court should have ruled that mere ignorance on the part of the assignee in bankruptcy of the cause of action would not take the case out of the statute of limitations; whereas the court refused so to rule.

43 Fifth. That the court should have ruled that if the assignee in bankruptcy had the means of ascertaining the facts, and he, through neglect or negligence on his part, omitted to avail himself of these means, it was the same thing as if he had knowledge of the facts; whereas the court refused so to rule.

Sixth. That the court should have ruled that if E. Rollins Morse received the assignment made by Ellis to him of the three policies, No. 68428, 68429, and 68430, without objection at the time to acting as trustee under the assignment, this would constitute an acceptance by him of the office of trustee under the assignment; that if he received the assignment and acted in any way as trustee under it he must be held to have accepted the office of trustee under it, and that had he declined or refused to accept the trusteeship under said assignment the trust created by it for the benefit of the daughters would not thereby have been defeated or have failed; that said Morse could not after the death of said Ellis, by refusing to claim or by disclaiming any interest in the policies, affect the rights of the daughters under the trust created for their benefit, and that his letter of Dec. 29, 1879, to the president of the insurance company could not vest the policies in the assignee in bankruptcy; whereas the court refused so to rule.

Seventh. That the court should have ruled that the assignment

in bankruptcy to Bates did not vest in him any interest in the policies, as he had no insurable interest in the life of the bankrupt, and that any assignment of the policies by the assignee or by any other person to one having no insurable interest in the life of the bankrupt would be invalid and convey nothing; whereas the court refused so to rule.

44 Eighth. That the court should have ruled that if the assignment was made to Morse without any valuable consideration, and Ellis was insolvent at the time when he made it, that would not enable the assignee in bankruptcy to avoid the assignment except to the extent of the value of the policies at the time of the assignment; whereas the court refused so to rule.

Ninth. That the court, in case it ruled that the plaintiff was entitled to recover, should have ruled that all that the plaintiff could recover in respect to policy No. 68428 was the surrender value of it at the time of the filing by said Ellis of his petition in bankruptcy; whereas the court refused to rule that the plaintiff's right of recovery was so limited.

Tenth. That the court ruled to the jury that the plaintiff was entitled to recover the amount claimed by him, viz., the several sums of ninety-three hundred and ninety dollars and forty-three cents and two hundred and fifty-eight dollars and twenty-one cents, and interest on each from the date of the writ, and directed the jury to render a verdict for the plaintiff accordingly; whereas such ruling and direction should not have been given.

EDWARD AVERY,
Administrator,
By JOSHUA D. BALL,
His Attorney.

45 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Massachusetts District,* } ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled William W. Cleary, assignee, *v.* Edward Avery, administrator, lately determined in said circuit court, and all proceedings therein, and of the assignment of errors and prayer for reversal therein.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this seventh day of Sept., in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

JOHN G. STETSON, *Clerk.*

46 *Bond on Writ of Error.*

Know all men by these presents that we, Edward Avery, of Braintree, in the county of Norfolk, administrator of the goods & estate of Matthias Ellis, late of Carver, in the county of Plymouth, deceased, as principal, and Samuel Shaw, of Newton, in the county of Middlesex, and Thomas B. Griffith, of Carver, in the county of Plymouth, and all in the Commonwealth of Massachusetts, as sureties, are held and firmly bound unto William W. Cleary, of Covington, in the State of Kentucky, as he is assignee in bankruptcy of the estate of Matthias Ellis aforesaid, in the full and just sum of eighteen thousand dollars, to be paid to the said Cleary, his certain attorney, successors in said office of assignee, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the nineteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a circuit court of the United States for the first circuit, holden at Boston, within and for the district of Massachusetts, in a suit depending in said court between said Cleary, as assignee as aforesaid, and said Avery, as administrator as aforesaid, judgment was rendered against the said Avery, as administrator as aforesaid; and the said Avery having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Cleary, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Avery shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

EDW. AVERY. [L. S.]
THOMAS B. GRIFFITH. [L. S.]
SAMUEL SHAW. [L. S.]

Signed, sealed, and delivered in presence of—
P. F. GOODRICH.
ALBERT E. AVERY.

Approved.

G. M. CARPENTER,
U. S. District Judge, Rhode Island District, Holding said Circuit Court.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

47 *Citation.*

The United States of America to William W. Cleary, of Covington, in the State of Kentucky, assignee in bankruptcy of the estate of Matthias Ellis, late of Carver, in the State of Massachusetts, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Edward Avery, of Braintree, in the State of Massachusetts, administrator of the goods and estate of Matthias Ellis aforesaid, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Carpenter, district judge for the district of Rhode Island, duly assigned to hold said circuit court and holding the same, this nineteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

G. M. CARPENTER, *J.*

BOSTON, MASS., *May* 20, 1886.

I acknowledge & accept service of the above citation & waive any further service thereof upon the defendant in error.

E. M. JOHNSON,
Of Counsel for Def't in Error.

Endorsed on cover: Massachusetts C. C. U. S. No. 162. Edward Avery, administrator of Matthias Ellis, deceased, plaintiff in error, *vs.* William W. Cleary, assignee in bankruptcy of Matthias Ellis. Filed October 12, 1886.

Supreme Court of the United States.

No. 162. October Term, 1889.

EDWARD AVERY,

Administrator of MATTHIAS ELLIS,

Plaintiff in Error,

v.

WILLIAM W. CLEARY,

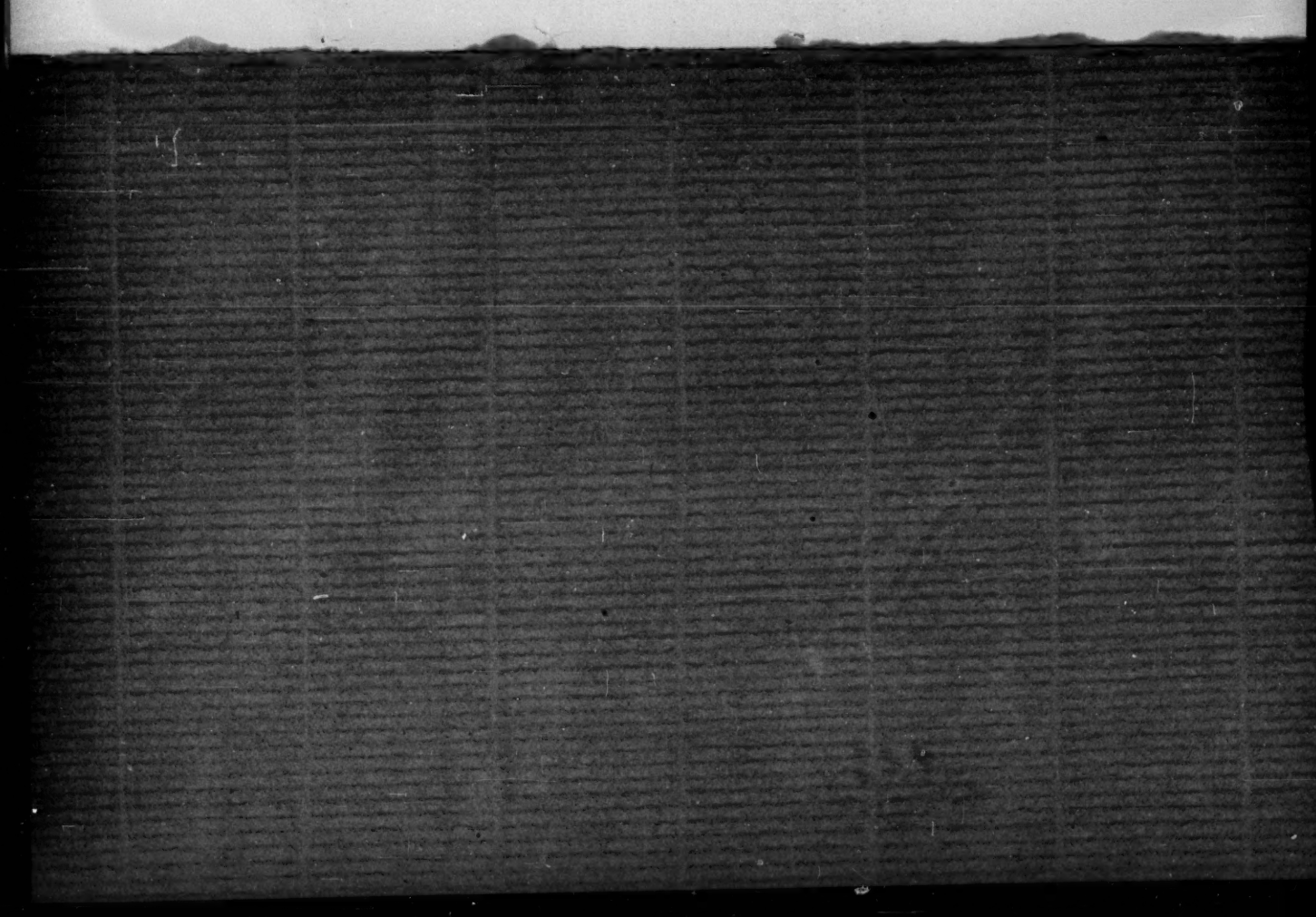
Assignee in Bankruptcy of MATTHIAS ELLIS,

Defendant in Error.

BRIEF OF JOSHUA D. BALL AND EDWARD AVERY,

For Plaintiff in Error.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL, NO. 39 ARCH STREET.
1889.



Supreme Court of the United States.

No. 162. October Term, 1889.

EDWARD AVERY, Administrator of MATTHIAS ELLIS, Deceased, Plaintiff in Error.

v.

WILLIAM W. CLEARY, Assignee in Bankruptcy of MATTHIAS ELLIS, Defendant in Error.

BRIEF ON BEHALF OF AVERY, ADMINISTRATOR, PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This was an action of contract brought Sept. 30, 1882, by Cleary against Avery, to recover $10,148.64, for money ($9,390.43) alleged to have been received by Avery upon a policy of insurance issued by the Connecticut Mutual Life Insurance Company, in the sum of $10,000, on the life of Matthias Ellis, dated March 2, 1867, and numbered 68,428, and $258.21, part of the surrender value of another policy of the same company on said Ellis' life, of same date, No. 68,430; and also the value of one undivided third part of certain tools and patterns.

Pages 2, 3.
Exhibit A, page 18.

At the trial Cleary abandoned the claim in respect to the one undivided third of the tools and patterns.

Pages 4, 5.

Cleary, in his declaration, alleges that said Ellis, on or about June, 1878, filed his petition in bankruptcy in the District Court of the United States for the District of Kentucky, and was adjudicated a bankrupt, and one H. W. Bates, of Greenup, Kentucky, was appointed assignee of his estate, and continued to act as such assignee until May, 1882, when he resigned, and Cleary was appointed in his place; that Ellis at the time he filed his petition in bankruptcy was the owner of two certain policies of insurance upon his life, issued by the Connecticut Mutual Life Insurance Company, numbered 68,428 and 68,430, the former being for $10,000, and the latter for $5,000, and that neither of these policies was mentioned in the schedules filed by the bankrupt, or disclosed or delivered to his assignee by said Ellis in his lifetime, but that the same were concealed and withheld by said Ellis from his assignee; and that policy No. 68,428 remained in the possession and control of said Ellis up to his death in November, 1879, and that it was thereupon taken possession of by said Avery in his capacity of administrator; that policy No. 68,430, on or about March 2, 1879, was surrendered by Ellis to the insurance company, and the surrender value thereof in part applied to pay the annual premium due on policy No. 68,428; that Avery, as administrator, collected and received from the insurance company $9,390.43 on said policy No. 68,428, and the further sum of $258.21 upon said policy No. 68,130, and that both of said sums were received on or about Jan. 1, 1880; and that he, Avery, well knew that said sums were the property of the assignee in bankruptcy, and not of the administrator of said Ellis, and failed and neglected to notify the assignee in bankruptcy thereof, or to turn over the same to him, but received the same without the knowledge or consent of the assignee in bankruptcy, and that the assignee in bankruptcy had no knowledge or information concerning the same, or the title or interest of the assignee therein up to a short time prior to the commencement of the suit, and that the same were concealed by Ellis in his lifetime and since his death by his administrator, and that immediately upon being informed of the existence of said property the assignee in bankruptcy demanded the same, or the proceeds thereof, from said Avery.

Pages 2, 3.

The answer of Avery denied all the allegations in the declaration

of Cleary contained, and alleged that the cause of action did not accrue to the assignee of the estate of Ellis within two years before the suit was brought, and that the cause of action did not accrue against the said Avery in his capacity as administrator within two years before the suit was brought.

Pages 3, 4.

In opening the case to the jury the counsel for said Cleary stated (p. 5), as the facts on which he should base his claim to recover, that Ellis went into bankruptcy on or about July 1, 1878; that he filed his schedules and put in substantially no property; that at that time he owned the policy No. 68,428 and policy 68,429, each for $10,000, issued by the Connecticut Mutual Life Insurance Company, and that they by operation of law passed to his assignee in bankruptcy, and should have gone to his creditors; that said Ellis at one time did a large business, became embarrassed about 1871, and continued embarrassed till the time of his death; that he owed at least $150,000 when he went into bankruptcy, and had owed it for several years before; *that in or about May, 1877, he made an assignment of these two and another policy of insurance in the same company to E. Rollins Morse, to hold for his said Ellis'* daughters; that this assignment was *voluntary;* that said Ellis was *heavily indebted* at the time, and that there was *no consideration* for the assignment, and that it was *illegal, fraudulent, and void;* that after filing his petition he came to Massachusetts, and *died in November, 1879; that he took one policy from said Morse and applied its surrender value to pay the premium which became due in March, 1879, on the two policies* of $10,000 each, and that Cleary claimed *that that policy also belonged to the assignee in bankruptcy;* that after said Ellis' death, the insurance company were called upon by Avery, as administrator, to pay him under policy No. 68,428, and that he. Avery, was met by the statement that there was an assignment of it to E. Rollins Morse, and said Morse, having been consulted by Avery, disclaimed and wrote a letter saying that he made no claim; *that Cleary would show that Morse never accepted the trust or knew of the assignment;* that after the letter of Morse the insurance company paid to Avery the proceeds of policy No. 68,428, less interest and a note given by Ellis, and likewise paid to Avery $258.21, the balance in their hands belonging to the surrendered policy.

Page 5.

This was the claim which Cleary's counsel made in opening the case to the jury.

The Connecticut Mutual Life Insurance Company, March 2, 1867, issued three policies to Ellis upon his life, No. 68,428, and No. 68,429, in $10,000 each, and No. 68,430 in $5,000. A copy of 68,428 is marked Exhibit A.

Page 7.
Exhibit A, page 18.

May 19, 1877, Ellis assigned these three policies to E. Rollins Morse, in trust for Ellis' two daughters, Helena Forsyth Ellis, and Marie Louise Ellis. The assignment is as follows: —

"In consideration of one dollar to me, paid by E. Rollins Morse, of Boston, the receipt of which is hereby acknowledged, I hereby transfer, assign, and set over to said E. Rollins Morse, three policies of insurance on my life, issued by the Connecticut Mutual Life Insurance Company, dated March 2, 1867, and numbered respectively 68,428, 68,429, and 68,430; Nos. 68,428 and 68,429 being for the sum of ten thousand dollars each, and No. 68,430 being for the sum of five thousand dollars; and also all profits, dividends, non-forfeiture policies, money, or other property that may arise from or be paid for or on account of said policies; to have and to hold the same unto said Morse, but in trust, nevertheless, to pay over the income, profits, or proceeds of the said policies to my two daughters, Helena Forsyth Ellis and Marie Louise Ellis.

In witness whereof, I have hereto set my hand and seal, this nineteenth day of May, A.D. 1877.

MATTHIAS ELLIS. [SEAL.]

Witness:

GEO. M. HOBBS."

Page 7.
Exhibit B, page 21.

Ellis filed his petition in bankruptcy in Kentucky, July 3, 1878, nearly fourteen months after the date of this assignment.

The two daughters of Ellis were minors, and Avery, Dec. 8, 1879, was appointed their guardian.

Page 15.

March 1, 1879, E. Rollins Morse, trustee, Ellis joined in the surrender, surrendered to the insurance company policy No. 68,430 for the sum of $1,054, applied in part in payment of the 1879 premiums on the other policies (68,428 and 68,429) assigned to him.

Page 7.
Exhibit C, page 22.

That exhibit is as follows: viz., " Received of the Connecticut Mutual Life Insurance Company, of Hartford, Conn., the sum of ten hundred and fifty-four dollars, which is hereby acknowledged as a full consideration and satisfaction for all claims and demand which we have or may have under or on account of policy No. 68,430, released, quit-claimed, surrendered, and discharged to said company; said amount having been applied as follows: —

In payment of 1879 premiums on policies Nos. 68,428 and 68,429	$495 20
Applicable in payment of future premiums on the same	249 28
In cancellation of premium note or credit . .	292 00
In cancellation of accrued interest on the same .	17 52
Total as above	$1,054 00

MATTHIAS ELLIS.

Dated at Boston, this 1st day of March, A.D. 1879.

E. ROLLINS MORSE, *Trustee.*"

Ellis died Nov. 21, 1879.
Page 7.

This was more than sixteen months after his petition in bankruptcy was filed.

E. Rollins Morse wrote to the insurance company a letter dated Dec. 29, 1879, in these words: —

"BOSTON, Dec. 29, 1879.

Dear Sir, — I find no assignment to me of policies Nos. 68,428 and 68,429 on the life of Matthias Ellis issued by your company, and I do not claim any interest in the same.

Yours respectfully,

E. ROLLINS MORSE.

To the President, etc., of the Connecticut Mutual Life Ins. Co., of Hartford, Conn."

Exhibit D, page 22.
Page 7.

Avery, who was *appointed Dec. 8, 1879, guardian of the two minor daughters for whose benefit Morse held the policies in trust*, explains how this letter by Morse came to be written.

Page 15.

Mr. Avery testified that he called on Morse in regard to the trust, had a conversation with him, and he, Morse, referred him (Avery) to his, E. Rollins Morse's, brother, John T. Morse, jr., a lawyer, with directions or instructions to consult him, and that whatever conclusions John T. Morse, jr., and Avery reached in regard to E. Rollins Morse's duty in the matter as trustee he would perform and carry out; that thereupon Avery called upon John T. Morse, jr., had several interviews with him, that he had not an absolute recollection, but had so very strong an impression that he should put it as next to an absolute recollection, that the conclusion they reached was communicated to E. Rollins Morse; *that under the assignment he, E. Rollins Morse, was simply a naked trustee, with authority, perhaps, to collect, but that immediately upon collection, at the request of the cestuis que trust or their guardian, he would be required to pay it over to them, and that the question was whether it was advisable for him to go through the form of collection, and then turn it over to Avery in his position of guardian of the children, or whether he, E. Rollins Morse, would release, abandon any claim under the assignment; that Mr. John T. Morse advised the latter course; that Avery concurred in it, and the result was either that identical letter or a release of all claim under the assignment.*

Pages 15, 16.

If Morse, trustee, had collected the money, it would have been his duty to have paid it to Avery, as guardian of the daughters.

Dec. 31, 1879, the insurance company paid to Avery, as administrator, $9,390.43 upon said policy No. 68,428, and the balance of the surrender value of policy 68,430, viz., $258.21, and on that day Avery, as administrator, receipted to the insurance company for those sums.

Page 7.

The money reached its right destination, as Avery was also guardian of the daughters.

Bates, who was elected assignee in bankruptcy Aug. 6, 1878, having resigned as assignee in bankruptcy in May, 1882, Cleary succeeded him, and the assignment to the latter as assignee was dated June 9, 1882.

Pages 2, 6.

No reference was made anywhere in Ellis' schedules in bankruptcy to any policy of insurance.

Page 6.

Cleary introduced evidence tending to show that said Ellis was largely in debt and in poor credit, and failed to pay his debts for a number of years prior to his death.

Pages 14, 15.

Cleary claimed that the assignment to E. Rollins Morse, trustee, was fraudulent and void, as against the creditors of said Ellis, and that said Morse never accepted the trust or knew of the assignment.

Page 5.

The said Avery (defendant below) by his counsel asked the Court to rule (page 7), "that this action was barred by the State "statute of limitations, not having been commenced within two years "from the time the cause of action accrued, unless the defendant "fraudulently concealed the cause of action from the knowledge of "Bates, the first assignee, the defendant citing and relying upon the "provisions of sections 3 and 14, of chapter 197 of the Public Stat-"utes of Massachusetts, re-enacting the provisions of section 2 of

"chapter 155 of the General Statutes of Massachusetts as amended "by chapter 177 of the Acts of the Legislature of Massachusetts, "in the year 1861, and re-enacting the provisions of section 12 of "said chapter 155 of the General Statutes.

"The defendant also asked the Court to rule that this action "was barred under the provisions of section 9 of chapter 136 of "the Public Statutes of Massachusetts, re-enacting the provisions "of section 5 of chapter 97 of the General Statutes of Massachu- "setts, because not commenced within two years from the time "defendant gave bond for the discharge of his trust of adminis- "trator.

"The defendant also asked the Court to rule that this action "was barred by the provisions of section 5057 of the Revised "Statutes of the United States, being the limitation of two years, "contained in the bankrupt law of the United States, unless the "defendant fraudulently concealed from Bates, the first assignee, "the alleged cause of action, and that mere omission on the part "of the defendant to disclose to Bates, the assignee, the facts "would not amount to a fraudulent concealment.

"The defendant also asked the Court to rule that mere ignorance "on the part of the assignee in bankruptcy of the cause of action "would not take the case out of the statute of limitations.

"The defendant also asked the Court to rule that if the assignee "in bankruptcy had the means of ascertaining the facts, and he "through neglect or negligence on his part omitted to avail him- "self of these means, it is the same thing as if he had knowledge "of the facts.

"The defendant also asked the Court to rule that if E. Rollins "Morse received the assignment made by Ellis to him, of the "three policies Nos. 68,428, 68,429, and 68,430, without objec- "tion at the time to acting as trustee under the assignment, this "would constitute an acceptance by him of the office of trustee "under the assignment; that if he received the assignment, and "acted in any way as trustee under it, he must be held to have "accepted the office of trustee under it, and that had he declined "or refused to accept the trusteeship under said assignment, the "trust created by it for the benefit of the daughters would not "thereby be defeated or fail; that said Morse could not after "the death of said Ellis, by refusing to claim or by disclaiming "any interest in the policies, affect the rights of the daughters

"under the trust created for their benefit, and that his letter of "Dec. 29, 1879, to the president of the insurance company could "not vest the policies in the assignee in bankruptcy.

"The defendant also asked the Court to rule that the assign- "ment in bankruptcy to Bates did not vest in him any interest in "the policies, as he had no insurable interest in the life of the bank- "rupt, and also to rule that any assignment of the policies by the "assignee, or by any other person, to one having no insurable "interest in the life of the bankrupt would be invalid, and convey "nothing.

"The defendant also asked the Court to rule that if the assign- "ment was made to Morse without any valuable consideration, and "Ellis was insolvent at the time when he made it, that would "not enable the assignee in bankruptcy to avoid the assignment, "except to the extent of the value of the policies at the time of the "assignment.

"The defendant also, in case the Court ruled that the plaintiff "was entitled to recover, asked the Court to rule that all that the "plaintiff was entitled to recover in respect to policy No. 68,428 "was the surrender value of it at the time of the filing by said Ellis "of his petition in bankruptcy.

"But the Court refused to give any of the rulings asked, and "ruled to the jury that the plaintiff was entitled to recover the "amount claimed by him, viz., said several sums of ninety-three "hundred and ninety dollars and forty-three cents, and two hun- "dred and fifty-eight dollars and twenty-one cents, and interest on "each from the date of the writ, and directed the jury to render "a verdict for the plaintiff accordingly; and the jury did render "a verdict for the plaintiff accordingly, in the sum of eleven "thousand five hundred and thirty-nine dollars and fifty-six cents. "The defendant duly excepted to the refusal of the Court to give "the rulings asked by him, and to the ruling and direction given "by the Court to the jury."

Pages 17, 18.

ASSIGNMENT OF ERRORS.

(Pages 23 and 24.)

First. That the Court should have ruled that this action was barred by the State statute of limitations, being sects. 3 and 14 of chap. 197 of the Public Statutes of Massachusetts (not having

been commenced within two years from the time the cause of action accrued), unless the defendant (Avery) fraudulently concealed the cause of action from the knowledge of Bates, the first assignee; whereas the Court refused so to rule.

Second. That the Court should have ruled that this action was barred under the provisions of sect. 9, of chap. 136 of the Public Statutes of Massachusetts, not having been commenced within two years from the time the defendant (Avery) gave bond for the discharge of his trust as administrator; whereas the Court refused so to rule.

Third. That the Court should have ruled that this action was barred by the provisions of sect. 5057 of the Revised Statutes of the United States (being the limitation of two years contained in the bankrupt law of the United States), unless the defendant (Avery) fraudulently concealed from Bates, the first assignee, the alleged cause of action; and that mere omission on the part of the defendant (Avery) to disclose to Bates, the assignee, the facts would not amount to a fraudulent concealment; whereas the Court refused so to rule.

Fourth. That the Court should have ruled that mere ignorance on the part of the assignee in bankruptcy of the cause of action, would not take the case out of the statute of limitations; whereas the Court refused so to rule.

Fifth. That the Court should have ruled that if the assignee in bankruptcy had the means of ascertaining the facts; and he, through neglect or negligence on his part, omitted to avail himself of these means, it was the same thing as if he had knowledge of the facts; whereas the Court refused so to rule.

Sixth. That the Court should have ruled that if E. Rollins Morse received the assignment made by Ellis to him of the three policies Nos. 68,428, 68,429, and 68,430, without objection at the time to acting as trustee under the assignment, this would constitute an acceptance by him of the office of trustee under the assignment; that if he received the assignment, and acted in any way as trustee under it, he must be held to have accepted the office of trustee under it; and that, had he declined or refused to accept the trusteeship under said assignment, the trust created by it for the benefit of the daughters would not thereby have been defeated or have failed; that said Morse could not, after the death of said Ellis, by refusing to claim, or by disclaiming any interest

in the policies, affect the rights of the daughters under the trust created for their benefit; and that his letter of Dec. 29, 1879, to to the president of the insurance company could not vest the policies in the assignee in bankruptcy; whereas the Court refused so to rule.

Seventh. That the Court should have ruled that the assignment in bankruptcy to Bates did not vest in him any interest in the policies, as he had no insurable interest in the life of the bankrupt, and that any assignment of the policies by the assignee or by any other person to one having no insurable interest in the life of the bankrupt would be invalid and convey nothing; whereas the Court refused so to rule.

Eighth. That the Court should have ruled that if the assignment was made to Morse without any valuable consideration, and Ellis was insolvent at the time when he made it, that would not enable the assignee in bankruptcy to avoid the assignment, except to the extent of the value of the policies at the time of the assignment; whereas the Court refused so to rule.

Ninth. That the Court, in case it ruled that the plaintiff was entitled to recover, should have ruled that all that the plaintiff could recover in respect to policy No. 68,428 was the surrender value of it at the time of the filing by said Ellis of his petition in bankruptcy; whereas the Court refused to rule that the plaintiff's right of recovery was so limited.

Tenth. That the Court ruled to the jury that the plaintiff was entitled to recover the amount claimed by him, viz., the several sums of $9,390.43 and $258.21, and interest on each from the date of the writ, and directed the jury to render a verdict for the plaintiff accordingly; whereas such ruling and direction should not have been given.

Pages 23, 24.

BRIEF OF THE ARGUMENT ON BEHALF OF AVERY.

I.

First Error Assigned.

The Court should have ruled that the action was barred by the State Statute of Limitations being Sections 3 and 14 of Chap. 197 of the Public Statutes of Massachusetts (not having been commenced within two years from the time the cause of action accrued), unless Avery fradulently concealed the cause of action from the knowledge of Bates, the first assignee. But the Court declined so to rule.

The language of Section 3 of that chapter so far as is material, is as follows, viz. : —

"*Actions for the taking or conversion of personal property,* "*brought against* executors, *administrators, guardians,* trustees, "sheriffs, deputy-sheriffs, constables, and assignees in insolvency, "*shall be commenced within two years next after the cause of action* "*accrues, and not afterwards.*"

The language of section 14 of that chapter is as follows, viz : —

"If a person liable to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from this knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action."

These two sections were a reënactment of Sect. 2, Ch. 155, of General Statutes of Massachusetts (1860), as amended by chap. 177, of 1861, and a reënactment of Sect. 12, Chap. 155, of said General Statutes.

There was no evidence in the case of *fraudulent concealment.* Avery *testified* "*that he never withheld in any way or concealed or attempted to conceal the fact that he had received the proceeds of these policies of insurance.*"

Page 15.

The Supreme Judicial Court of Massachusetts, in an action of trespass for breaking and entering plaintiff's close and cutting and carrying away wood and timber therefrom, say "The plaintiff as well as her husband had the means of ascertaining the cause of action by the exercise of ordinary vigilance, *and that as the de-*

fendant took no pains to conceal his acts, either while he was committing the trespasses or at any time afterwards, his mere neglect to go to the plaintiff and give her information of what he had done is not such concealment on his part as the statute contemplates."

Nudd *v.* Hamblin, 8 Allen, 130, 134.

The declaration does not allege a "*fradulent concealment*" by Avery, but only a concealment.

Page 3.

Avery's counsel, although there was no evidence tending to show fraudulent concealment, did not ask the Court to rule absolutely that this State statute was a bar, but to submit that question to the jury, and to rule that the State statute was a bar, unless Avery fradulently concealed the cause of action from the knowledge of Bates.

This court have said that under the judiciary act of 1789, "acts of limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the Courts of the United States, and the same effect is given to them as is given in the State Courts."

McCluny *v.* Silliman, 3 Peters, 270.
Ross *v.* Duvall, 13 Peters, 45.

The assignment to E. Rollins Morse, trustee, was made May 19, 1877. Bates, the assignee, was appointed Aug. 6, 1878. Avery was appointed, Dec. 8, 1879, administrator of the estate of Mathias Ellis; Avery was on the same day appointed guardian of the two daughters, who were minors. The money was received by Avery Dec. 31, 1879, and this action was brought Sept. 30, 1882.

The whole theory upon which this suit proceeds, is that Avery wrongfully took or received the money from the insurance company; that his act was a wrongful or tortious act, — not that it was a legal or rightful act.

Bates, whose deposition was taken and used by Cleary, on direct examination, testified (p. 8) "that he was acquainted with said Ellis some twelve years; that said Ellis was adjudged a bankrupt in the District Court for the State of Kentucky, and that he (the witness) was the Horace W. Bates who was appointed assignee and ac-

cepted the appointment; that no assets of value came to his hands as assignee, and that none were disclosed as being the property of said Ellis; that said Ellis did not turn over to him any policies of insurance of any kind; that said Ellis did not give him any information, after filing his petition in bankruptcy, as to having any insurance; *that some time previously said Ellis had informed him that he (Ellis) had not been able to keep up his premiums on his life insurance, giving him (the witness) the impression that, in consequence, such policies lapsed; that at or about the same time, he (the witness) learned indirectly that an assignment of some policy or policies had been made to E. Rollins Morse, of Boston. That after the filing of the petition in bankruptcy he (the witness) asked said Ellis if there was any property in Massachusetts which should be brought into the proceedings, to which reply was given that there was no property which was in his (Ellis') control; that supposing all life-insurance policies had lapsed or been assigned, and passed from the control of said Ellis, he (the witness) did nothing in relation to said insurance;* that no assignment, transfer, or release of any assets was ever made by the witness; that the *first information witness had of the existence of any policies in which said Ellis had any interest was some months after the death of said Ellis;* that witness did not remember from whom such information was learned; that he (the witness) made no assignment, and gave no authority to any one to collect any proceeds of life insurance, nor made any transfer of any claims of any kind, while acting as assignee; that he (witness) knew the defendant" (Avery) "but slightly; did not remember having seen him since Ellis' death, and had no communication with him, written or verbal."

On cross-examination the witness Bates testified in his deposition (p. 8) "that he had, since December, 1879, received letters from Joseph Pratt, — perhaps three or four; that he could not annex them to his deposition, as he he did not keep them; that after replying to the letters received he destroyed them, as it is not his practice to keep letters which he does not at the time deem important; *that he knew that said Ellis had insurance on his life to a large amount, taken about 1864 or 1865; that he knew that the premiums on said life-insurance, amounting to some $1,500 per year, were kept paid up to about 1872 or 1873; that after that time he, witness, knew of Ellis' financial troubles to some extent, and his, witness', belief was as before stated that his, witness',*

understanding from said Ellis was after learning of the assignment to E. Rollins Morse, that such policy or policies had some time previously passed from his control and were not a part of his assets in bankruptcy; that from such information as he, witness, received, he concluded there was no value to the creditors in such policy or policies; that his suppositions were, further than before stated, that such policies as were original were for a valuable consideration as he, witness, knew of Ellis making drafts upon E. Rollins Morse; that his, witness', supposition was that all of said policies had either lapsed for non-payment of premium or had been assigned beyond his control; that he, witness, supposed he had assigned policies to a small amount as stated; *that he did not suppose that his, Ellis', daughters had any interest in any policies of insurance, and that the witness had not reason to believe that there remained any insurance belonging to Ellis or his estate; that witness' recollection was that said Ellis' life-insurance, when taken about 1864 or 1865, was nearly or quite one hundred thousand dollars; that he knew of fifty thousand dollars being taken at one time, and that he thinks more was afterwards taken; that he knew of said Ellis paying his premium on his life-insurance, up to about 1873, possibly 1874, as he, witness, furnished him money which he, Ellis, said was to be used for that purpose; but that witness does not know that it was so used; that after that time witness was quite well acquainted with said Ellis' business affairs, and knew of his inability to maintain the large payment necessary to keep the policies in force; that witness cannot fix upon any special conversation with said Ellis as to such matters, nor fix any date, as he saw him very frequently for some two years before his bankruptcy; that witness did not remember the exact year of said Ellis' death; that his first information of it was from a Plymouth paper at the time; that witness did not then suppose that he, Ellis, had any life-insurance which would benefit his daughters, or indeed, any property of value; that witness supposed that such policies, as had been assigned, had been in effect sold or pledged for money, which he, Ellis, had received and spent; that witness' first information as to the daughters of said Ellis receiving any insurance money from E. Rollins Morse was, witness thought, from the letter, received from Joseph Pratt; that witness did not then suppose such money had been assigned to said Morse for their benefit; that witness' supposition and belief, derived from his general knowledge of*

Ellis' affairs, was that said Morse had furnished said Ellis money, and as a pledge for it, or possibly by a direct purchase had taken a certain amount of insurance, taking the chance of Ellis living or dying, that witness' supposition further was that by reason of said Ellis' death the policies became payable, which repaid Morse for his payments; and that he turned over to said Ellis' daughters the part remaining; it being understood generally that they were left without means."

Pages 8 and 9.

It is very clear under this statute of Massachusetts that the *mere ignorance* of Bates would not suspend the operation of the statute. The only thing which suspends its operation is *fraudulent concealment.*

And no *fraudulent* concealment is alleged in the declaration (p. 3), and no evidence tending to prove any was offered at the trial.

The bill of exceptions (on p. 17), recites, that the evidence set forth in it, is "all the evidence which was introduced by either party that is material."

The ruling asked should have been given by the Court.

II.

Second Error Assigned.

Second. The 9th section of Chap. 136 of the Public Statutes of Massachusetts relates to suits against an administrator by *creditors* of the deceased, and probably has no application to the present case.

III., IV., V.

Third, Fourth, and Fifth Errors Assigned.

Third. That the Court should have ruled that this action was barred by the provisions of Sect. 5057 of the Revised Statutes of the United States (being the limitation of two years contained in the Bankrupt Law of the United States), unless Avery fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of Avery to disclose to Bates, the assignee, the facts, would not amount to a fraudulent concealment. The Court declined to so rule.

Fourth. That the Court should have ruled that mere ignorance on the part of the assignee in bankruptcy of the cause of action would not take the case out of the statute of limitations. The Court declined to so rule.

Fifth. That the Court should have ruled that if the assignee in bankruptcy had the means of ascertaining the facts, and he through neglect or negligence on his part, omitted to avail himself of these means, it was the same thing as if he had knowledge of the facts. The Court declined to so rule.

By Sect. 5057 of the Revised Statutes of the United States, title "Bankruptcy," it is provided that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at a time when an assignee is appointed."

The statute applies, not only to suits to recover property belonging to the bankrupt or conveyed in fraud, but also to actions to recover money or debts owing to the bankrupt.

Jenkins *v.* International Bank, 106 U. S., 571.
Bailey *v.* Glover, 21 Wallace, 346.
Gifford *v.* Helms, 98 U. S., 252.
Wisner *v.* Brown, 122 U. S., 214.

a. That Bates, the *assignee, knew that Ellis had had policies of insurance on his life to a very large amount; that he learned indirectly before the petition in bankruptcy was filed, that an assignment of some policy or policies had been made to Morse; that he supposed they had lapsed or been assigned; that he made no effort to find out anything further about them; that he could readily have found out by very little exertion; that with what information he had he was put upon inquiry, seem quite clear from the evidence.* He continued assignee till May, 1882. This Court, in Bailey *v.* Glover, 21 Wallace, 342, says on page 348, that in equity the decided weight of authority is that "where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part*, the statute does not begin to run

until the fraud is discovered;" and on page 349, "that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity;" and on same page, "We hold that *when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud* which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by or becomes known to the party suing, or those in privity with him."

See Rosenthal *v.* Walker, 111 U. S., 185, where the allegation was fraudulent concealment.
Vide also Traer *v.* Clews, 115 U. S., 528.

b. "The postponement is not until the discovery of fraud, but until the period when, with due diligence, he might have discovered it."

Andrews *v.* Dole, 11 Nat. Bank Reg. (New Jersey), 366.

c. Mere failure to discover the cause of action where there is no element of concealment does not take the case out of the statute.

Norton *v.* Villebeuve, 13 Nat. Bank Reg. (Woods, J.), 304.

d. "If he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment by others."

Nudd *v.* Hamblin, 8 Allen, 133.
See also Cole *v.* McGlathry, 9 Greenleaf, 131.
McKown *v.* Whitmore, 31 Maine, 448.
Rouse *v.* Southard, 39 Maine, 404.
Yancy *v.* Cothran, 32 Fed. Reporter, 687.

e. He was put on inquiry, and various circumstances existed which might have led him to take proceedings to find out earlier.

Dean *v.* Thwaite, 21 Beavan, 623.

f. In Bishop *v.* Little, 3 Greenleaf, 408, the Court says: "No

case can be found where the statute has been avoided at law or in equity, unless on ground of fraudulent concealment on defendant's part."

In Gibbs *v.* Guild, 9 Law Rep. (Queen's Bench Division), 59, a replication to a plea of the Statute of Limitations, that defendant concealed the fraud during six years was held good, and that the statute did not begin to run till the discovery. That action was to recover damages for fraudulent representations made by defendant to plaintiff to induce plaintiff to purchase shares in a company, and was after the passage of the Judicature Act of 1873, by which common law and equity, in a certain sense, were both abolished, and the High Court of Justice was not only empowered, but ordered, to administer justice according to the principles of law and equity together, and to give relief according to such principles concurrently. The court say that if they proceed on the principles of strict common-law actions and strict common-law pleadings, there were two decisions in point in favor of the defendant, and that such replication would not be held good, viz.: Hunter *v.* Gibbons, 1 Hurlstone & Norman, 459, and Imperial Gas Light Co. *v* London Gas Light Co., 10 Exchequer, 39; and if a pure equity proceeding, the replication would be held good, as decided in Booth *v* Lord Warrington, 4 Brown Parliament Cases, 163. The court then proceeded to decide the case on the ground that it was not bound by the rules of the common law, but would have to see what a court of equity would have done in such a case.

Bates, the first assignee in bankruptcy, was aware of the existence at one time of policies of insurance on Ellis' life. *He learned indirectly before Ellis' bankruptcy that a policy, or policies had been assigned to Morse.* He (Bates) might, by slight efforts, have found out all the circumstances in regard to these policies. He was not bound to assert any interest in them. An assignee is not bound to assert a title to all property of a debtor. Some of it may be a *damnosa hæreditas*, an oppressive lease, for instance, or other burdensome contracts, or some policies of life insurance. He can refuse to assert a title over that which will be of no benefit or a damage to the estate.

Why did he not institute inquiries? Why did he not examine Ellis in his lifetime?

Ellis' petition in bankruptcy was filed in Kentucky July 3,

1878, and Bates was elected assignee Aug. 6, 1878, and continued to act as such until May 1882, when he resigned and Cleary was appointed.

Ellis died Nov. 21, 1879.

Page 7.

This suit was brought Sept. 30, 1882.

Page 4.

Joseph Pratt, a creditor and brother-in-law of Ellis, testified that he informed Bates after March, 1882, of the existence of the policies.

Page 15.

Bates had quite enough of information to put him on a course of enquiry which would have resulted in his knowing all the facts about these policies. He never intended to assert any title, and hence he made no inquiries.

Bates knew of the policies, or, to say the least, was put on inquiry, and must be assumed to know what he would have ascertained had he made inquiry.

If there was any evidence tending to show that Bates knew of the policies or had sufficient information to put him upon inquiry, the question of his knowledge or the extent of his information should have been submitted to the jury.

g. But even if the rule be the same at law as in equity, there was no concealment by Avery, and none was pretended.

h. Concealment implies knowledge on the part of Avery that the assignee in bankruptcy had some right to the policy or to the money, and some act done by Avery, with a view to keep the assignee from knowledge of the existence of the policy or collection of the money.

i. It did not appear that Bates had made the slightest effort to obtain any knowledge or information in regard to the policies.

Upon the state of the evidence in the case, the court should have given the third, fourth, and fifth rulings asked.

VI.

Sixth Error Assigned.

"That the Court should have ruled that if E. Rollins Morse received the assignment made by Ellis to him of the three policies Nos. 68,428, 68,429, and 68,430, without objection at the time to acting as trustee under the assignment, this would constitute an acceptance by him of the office of trustee under the assignment; that, if he received the assignment and acted in any way as trustee under it, he must be held to have accepted the office of trustee under it, and that had he declined or refused to accept the trusteeship under said assignment, the trust created by it for the benefit of the daughters would not thereby have been defeated or have failed; that said Morse could not, after the death of said Ellis, by refusing to claim or by disclaiming any interest in the policies, affect the rights of the daughters under the trust created for their benefit, and that his letter of Dec. 29, 1879, to the president of the insurance company could not vest the policies in the assignee in bankruptcy."

a. The plaintiff, in order to recover anything, must stand upon his own title; he must, if he can recover at all, recover upon the strength of his own title.

b. If Avery was entitled to the money, either as administrator of Ellis or guardian of the two daughters, or any person other than the assignee in bankruptcy was entitled to it, the assignee in bankruptcy cannot recover. He must recover upon the strength of his own title, and not upon the weakness of Avery's title.

c. If E. Rollins Morse, as trustee for the two daughters of Matthias Ellis, or these two daughters were entitled to the money, then the assignee in bankruptcy could recover nothing.

d. Matthias Ellis, on March 2, 1867, had obtained from the insurance company the three policies Nos. 68,428, 68,429, and 68,430, the last mentioned being for $5,000, and each of the others for $10,000.

Page 7.

A copy of the policy in question here, No. 68,428, is annexed.

Exhibit A, pages 7 and 18.

e. It appeared from the deposition of Taylor, Secretary of the Connecticut Mutual Life Insurance Company, that they had in their possession an assignment of the three policies, a copy of which said assignment is hereto annexed, and marked "Ex. B." He declined to annex the original to his deposition. *This assignment, which was for the benefit of the two minor daughters of Ellis, was made May 19, 1877, more than thirteen months before Ellis went into bankruptcy.*

Page 7.
Exhibit B, page 21.

Cleary's counsel, in his opening, claimed that Morse never accepted the trust, or knew of the assignment.

This position was not sustained by the evidence.

It was admitted by Cleary's counsel that Morse signed Exhibit C.

Page 16.

It did, therefore, clearly appear by that exhibit (p. 22) that Morse had acted under the assignment. He surrendered one of the policies assigned to him, and agreed that the surrender value of it, should be applied to pay premiums on the two other policies assigned to him.

That his memory, after the long lapse of time, should not be very clear, is certainly not surprising. He did not testify in the case until about January 7, 1886. That was the day when the verdict was given.

Page 4.

Mr. Morse was called as a witness by Cleary, and on direct examination testified as follows, viz. : —

Page 10. "That he had been in business in Boston for about "twenty years; that he was a banker from 1872 until 1882, on "State street, in Boston; that he had known said Ellis since about "1863 or 1864; that he knew Ellis had some interest in some either "iron mines or hills in the West; did not know whether it was in "1873; should say it probably was, and that was his chief busi-

"ness or interest that witness knew; that when Ellis was in the "East, he was apt to come into the witness's office and see him, "not on business, but he was apt to drop in, and from time to "time left papers with the witness for care and safe-keeping very "frequently; that witness always had one envelope where he used "to put them, marked with Ellis's name, in witness's own private "trunk; that it was never understood that he, witness, was to "examine them necessarily; that witness looked upon it that he "had a right to do it if he wanted to, but he very seldom did it, "and that he did not know that he ever did it; that he, "witness, remembered seeing an assignment of a policy in the "Mutual Benefit, he thinks it was; that he thinks he did "see one assignment, don't think he ever had custody of it, but "thinks he did see one that he (Ellis) had made out, — policy "in the Mutual Benefit Life Insurance Company, which he (wit- "ness) subsequently collected; that is the only one he ever "remembered of having had or seen; did not remember the num- "ber of it. That the amount he (witness) collected in cash on it "was about $16,000; that the policy had been changed from time "to time; and that he did not remember what it originally was; "that it had to be marked down to keep it alive; that he did "not think that he ever had in his possession, or seen or handled "a paper purporting to be the assignment of three policies of in- "surance in the Connecticut Mutual Life Insurance Company, on "the life of Matthias Ellis; that he did not remember of ever hav- "ing seen it or had it; that the first time he knew or had (p. 11) "reason to believe that such a paper was in existence was when "he was called upon by Mr. McFarlane, who said that the com- "pany declined to pay him the money on the policy that had been "assigned to him, unles he (witness) stated that he (witness) had "no claim under that policy; that this was after the death of said "Ellis; that McFarland came as representing the Ellis Foundry "Company; that witness did not know what his official capacity "was, whether he was president, treasurer, or general manager, "but that he represented that company; that this was a very "short time after said Ellis' death, so that the reason assigned "was that they wished to put the claim in within the sixty days, "and that they wanted him (witness) to write that letter (Exhibit "D), — thinks within sixty days, but that it may have been that "the application was made, and that they asked witness to put it

"in, in order that they might complete it; that at that request he "(witness) signed a letter; that witness did not remember before "that day on which he signed that letter, of having any knowledge "that there was any assignment of these policies to him anywhere; "that he did not think he could have; that he could not remem- "ber about the amount of insurance of that policy that McFar- "lane called his attention to; that he should have said that there "was more than one policy; that he should have said there were "three, if he was not mistaken, but that he could not remember "positively about that, it was so long ago; that he did not "put it specially in his mind to keep it, because he did not "expect to have to think of it again; that he thought there "were three policies of $5,000 each, but, as he said, he might be "mistaken; that he could not be certain about his mentioning a "policy of $10,000; that he had not at any time been shown "any paper purporting to be an assignment of three policies from "Matthias Ellis to him; that he had never been shown anything "of the kind that he remembered; that it was so long ago that "he may have forgotten it; *that he really could not say whether "he ever had anything to do with taking any active part in hand- "ling, or have anything to do with more than one policy on the "life of Matthias Ellis; that, yes, he thought he did; that he thinks "he had more than one policy at one time; that they varied "greatly, because at one time, he (Ellis) was unable to pay the "premiums and 'we' were obliged to change them about so that he "(witness) thought he did have more than one policy in the be- "ginning; that he thinks the policy he (witness) collected under "was originally two policies, and that it had been changed "perhaps two or three times, twice certainly; that he (witness), "a number of times, at the request of said Ellis, did some- "thing in relation to the surrendering of a policy; that he (witness) "signed several papers that he (Ellis) brought in when he took the "policies; that when he (Ellis) originally took the policies he used "to pay in cash, and then certainly once; and he (witness) thought "twice, when he took them, he was going to reduce the first value in "order to pay the premium on them; that those papers he (witness) "signed in connection with them; that witness did not undertake to "examine with any care at all any paper when he signed it, to "canvass it as he did with his (witness's) own transactions;* that the "money that he (witness), (page 12) collected after the death of

" said Ellis, as well as he could remember, he collected from J. B. " Kniver, on State street, just between Devonshire and Washington " streets, the Mutual Benefit of New Jersey ; that that was where he " collected the money ; that he held there two policies, he thinks, " and received them from Mr. Ellis ; that he (witness) held them " in conjunction with the trust which had been created some time " before, and which he (Ellis) wished to have those added to ; that " he could not fix the time or how long that trust had existed, but " that it started a great many years prior to said Ellis' death, he " should think ; that it was not by Mr. Ellis, but by a friend of Mr. " Ellis, for the benefit of his children ; that it was the Hovey trust " for the benefit of Mr. Ellis' two children, and that it had existed " for many years, and that this policy, or these two policies, that " came into his hands, and afterwards collected the money on, " were policies that Mr. Ellis had handed to him, with the request " that he (witness) should add it to that trust, and that witness " did so, and he collected the money of the Mutual Benefit of New " Jersey ; *that he never entered into any agreement with Mr. Ellis " for any other trust than what he (witness) had mentioned; that " he never accepted any other trust for Mr. Ellis than the one he " (witness) had mentioned; that he did not know the standing of " Mr. Ellis or his reputation for credit in 1877, or along there, for " some years; that he had no business transaction with him at that " time at all; that he (witness) had no recollection at all of the orig- " inal of which Exhibit C is a copy; that he signed it at said " Ellis' request;* that he could not say it had anything to do with " the trust he had spoken of: that if he signed it 'E. Rollins " Morse, Trustee,' he supposes that he was under the impres- " sion that it was, *but that he signed a great many papers " at that time without knowing, of course, or examining sufficiently;* " (after examining Exhibit C) that he cannot connect it with the " Hovey trust; that he (witness) had not been able to find any " memorandum of any policies in the Connecticut Mutual Life In- " surance Company ; that he had looked for the purpose of finding " them if he could, but not recently ; that when this matter was first " presented he did : that he looked over all his memoranda or docu- " ments to see if he could find anything which would entitle him to " retain those policies at that time, and never found out so much " as he had since he came into the court-room ; that he found no " memorandum of any thing of any kind, in any shape or manner ;

"that after the death of said Ellis he (witness) wrote that letter "to which he refused [referred] to a short time ago to say that "he made no claim against the company."

Pages 10, 11, 12.

On cross-examination (p. 12) this witness's testimony was "*that "he did not pretend to say that he had any distinct recollection as "to the number of papers Mr. Ellis handed to him from time "to time in his lifetime; that he did not think said Ellis ever "handed him any assignment; that he does not think that he "handed him the assignment in the New Jersey Mutual;* that he "thinks he merely showed it to him and said he was going to take "it to the office of the company; *that he had no recollection as to "how many policies of insurance he ever had in his possession from "Matthias Ellis; that he cannot tell certainly (p. 13); that he is "very certain that he had more than one; whether more than two "or three he could not say at all, that he does not remember; that "he has memory now as to the office the one he collected was in, but "not the others; that he don't know that he had any others; "that he does not recollect whether he did or not; that he don't recol-"lect anything about it;* kept a memorandum from time to time of "papers he (Ellis) brought him for that trust, but not all that he "brought to him for safe keeping until he came again; kept them "all in the same box that he referred to before, the Hovey trust "and the other papers; *that he had no doubt at all that he signed "the receipt (Exhibit C) if the Connecticut Mutual say that they "hold such a paper. Before this was called to his attention he had "no recollection of signing such a paper; had no memory as to the "exact papers; that he knew that he signed several papers in "connection with several companies; that he has an idea that "he signed that paper without reading it; that he sometimes "signed papers without reading them; that it is not his "habit with his own business; that when it does not affect "his own business he sometimes does; knew that it would not affect "his own business from the printed part of the paper; that he could "see what it was; if they say that his signature to that paper is a "genuine signature, it is very probable; that he should not think "anybody would commit forgery, and should not dare to testify that "he thought so; can give no idea of the number of papers which "Matthias Ellis from time to time brought to him, and which he*

" *put in that box, that he could not tell at all;* that he had not the " slightest remembrance; that he took no memorandum of it; *they* " *were in his (witness's) safe; they were not put in a private box* " *that he (Ellis) had a key to, but in a private box of his (witness's)* " *own in his safe; the box had a lock to it; said Ellis did not have* " *a key to it, and he (witness) had the key to it; that he did not* " *swear that the assignment of these three policies of the Connecticut* " *Company was never in that box; that he had not been asked to* " *swear to that; that all he means to say is that he don't remember* " *it; that it is very difficult to remember so many years back;* " *that he did not recollect Mr. Ball (defendant's counsel) com-* " *ing to see him to ascertain what he knew on the subject until* " *he (Mr. Ball) spoke of it; that he remembers now that he* " *(Ball) came in and told him (witness) who he (Ball) was,* " *and that witness told him that he had known him a great many* " *years; that he did not remember the interview with said Ball* " *until he (Ball) mentioned it a few minutes ago; that he don't* " *know whether this interview was two years or five years ago;* " *that it was after Mr. Ellis' death; that at that interview he sub-* " *stantially told said Ball that he had forgotten and did not re-* " *member anythiny about the matter; that he don't think that he* " *he went so far as to say that his memory was a blank; that he* " *said that he did not recollect distinctly about it; that he has* " *already said that he has no recollection of any assignment, but* " *thought he had seen one of another company; that he does not* " *mean to swear that that assignment (Exhibit B) was not in his* " *possession; that he had not sworn that yet; that he had stated* " *that he would have had no (p. 14) recollection of signing said* " *receipt (Exhibit C), if his attention had not been called to it;* " *that he has no recollection at all, even now that he has seen it.'*

Pages 12, 13, 14.

On redirect examination (p. 14) the testimony of this witness was " that the paper of which Exhibit D is a copy was in his hand- " writing; that he wrote it at the request of Mr. McFarland; that " of course he could not remember definitely to whom he delivered " that paper after he signed it, but he should say that Mr. " McFarland waited until he wrote it and took it, but that he was " not at all certain about it; *that he had no recollection of ever* " *himself sending to the Connecticut Mutual Life Ins. Co. any*

"*assignment of the policies — ever sending for record any assign-*
"*ment that Ellis had made to him.*"

Page 14.

On re-cross examination (p. 14) his testimony was "*that he had*
"*no remembrance of sending any assignment at all to the Con-*
"*necticut Mutual Life Ins. Co.; that he could not say that he*
"*remembered that he did not; that he presumed that he had no*
"*recollection on the subject either one way or the other, whether*
"*he did or did not; that he certainly does not remember of send-*
"*ing any; that he has stated that he cannot swear positively that*
"*he did not send the assignment of these policies to the Connecticut*
"*Mutual Life Ins. Co., but that his remembrance is that he*
"*has no remembrance of sending it; that he does not swear that he*
"*did not have the assignment, and that he does not swear that he*
"*did not send it.*"

Page 14.

It was admitted that he signed Exhibit C (bottom of page 16). His memory was as indistinct about that exhibit as it was about the assignment.

a. That Morse acted under the assignment, and surrendered policy No. 68,430, and had the surrender value apply on the two other policies, Nos. 68,428 and 68,429, which he held under the assignment, seems to be proved beyond a doubt.

b. The assignment to Morse was in the possession of the insurance company (bottom of p. 7). Some person must have delivered it to the company. *Morse did not swear that he did not have the assignment (pp. 13, 14), and he did not swear that he did not send it to the company (p. 14). That he had various policies from time to time in his possession on Ellis' life, he admits (pp. 11–13). He is not able to particularize them. H d seen more than one assignment (p. 13).* There is no reason shown why he should not have accepted the trust, and after the long lapse of time between the date of the assignment — viz., May 19, 1877 — and the time when he gave his testimony, — viz., January, 1886, — it is not surprising that his recollection is not very clear.

But that he acted under the assignment there can be no doubt, as he surrendered one of the policies assigned, and had its surrender value apply on the premiums on the other two policies as-

signed to him by the same assignment. This surrender was March 1, 1879, about six years and ten months before he gave his testimony. He had forgotten that he ever did this; but his signature to the receipt was admitted.

The presumption is that he accepted the assignment.

c. Any act by Morse under it would amount to an acceptance of the trust.

Surrendering one of the policies assigned, and having its surrender value applied on the premiums on the other policies assigned to him, was an act, and an important act, done by him as trustee.

After that act it was too late to argue that he did not accept the trust.

d. Morse, the trustee, having acted, could not afterwards affect the rights of the *cestuis que trust*, the two daughters, by not acting further. If he desired to cease to act he could resign, and then another trustee would have been appointed in his place. For a court of equity to appoint a trustee is a familiar branch of equity jurisprudence, and in Massachusetts a statute has been in force for many years authorizing the Court to appoint a new trustee under a written instrument, where the prior trustee has declined, died, resigned, or been removed before the objects of the trust have been accomplished.

Rev. Stat. of Mass. (1836), ch. 69, sec. 8.
Gen. Stat. of Mass. (1860), ch. 100, sec. 9.
Public Stat. of Mass. (1882), ch. 141, sec. 5.

e. Even had Mr. Morse declined to accept the trust, the trust would not fail for that reason.

f. A trust never fails because the trustee declines to accept. The proper Court will intervene and appoint a trustee to administer and execute the trusts.

Adams *v.* Adams, 21 Wallace, 185.

g. Even had the assignment never been delivered to Morse, the trust would have been supported and upheld. Its delivery was not essential to its validity.

Adams *v.* Adams, 21 Wallace, 185.

h. Even had Morse never been notified of the trust, or had declined the trust, the assignment would still be upheld and a new trustee appointed.

Adams *v.* Adams, 21 Wallace, 185.
Perry on Trusts, secs. 38, 45.
2 Story, Eq. Jurisprudence, sec. 976.

In Adams *v.* Adams (21 Wallace, 185) the husband and wife executed and acknowledged a deed of real estate for the benefit of the wife. The husband got the deed recorded and always kept it in his own possession, except while it was at the record office. It never, in fact, was delivered. The trustee did not know of its existence, and when first informed of its existence he declined the trust. He never acted in any way under the deed. The Court below upheld the trust, and appointed a new trustee to execute it, and this Court affirmed the decree.

A woman executed, in 1852, a deed purporting to assign her interest in certain South-sea annuities to trustees in trust for her nieces for life, and after their death for certain charities. The deed was prepared by her solicitor; but she retained it in her own possession for some time, and never informed any person of its execution. Shortly before her death she destroyed it, and made a codicil to her will purporting to dispose of the same interest to the children of her brother. The trustees in the deed deposited the fund in Court, and the children of the brother petitioned to have the fund paid to them. Held, that the trust deed must stand, although no notice was given of it to any person but the solicitor.

Way's settlement, 10 Jurist (N.S.), page 1166.

Even if no trustee had been named the trust would have been upheld and a trustee appointed.

Bailey *v.* Kilburn, 10 Metcalf (Mass.), pp. 176, 179.

No delivery of the assignment was necessary, and a failure by Morse to accept the trust would not have invalidated it.

Adams *v.* Adams, 21 Wallace, 185.
Way's settlement, 10 Jurist (N.S.), 1166.

i. Morse, by disclaiming after Ellis' death any interest in the policies, could not affect the rights of the *cestuis que trust*, the two daughters. Their rights still remained.

There was no evidence that they were ever consulted upon the subject of disclaiming.

j. Morse's disclaimer could not, under any circumstances, have vested in the assignee in bankruptcy any interest.

Avery explains how that disclaimer happened to be made, and his testimony was not contradicted. Upon this point Avery testifies (pages 15, 16), "that he could not say that he had the letter of Dec. 29, 1879, from E. Rollins Morse, to the president of the Connecticut Mutual Life Insurance Company in his, the witness's possession any length of time; that he saw it, was cognizant of the writing of it and the delivery of it to the company; that there was something passed between him and E. Rollins Morse in respect to the subject-matter of that letter, whether in regard to that particular letter or not he, witness, did not know, but as to the subject-matter out of which that letter grew, in regard to his, Morse's, trusteeship, and his disclaiming any claim; that he, witness, called on said Morse in regard to the trust, had a conversation with him and he, Morse, referred witness to his, Morse's, brother, John T. Morse, Jr., a lawyer, with directions or instructions to consult him, and that whatever conclusions Mr. John T. Morse, Jr., and witness reached in regard to his, E. Rollins Morse's, duty in the matter as trustee, he would perform and carry out; that thereupon he, witness, called upon Mr. John T. Morse, Jr., and he, witness, and John T. Morse, Jr., had several interviews; that he, witness, had not an absolute recollection, but still so very strong an impression that he should put it as next to an absolute recollection, that the conclusion they reached was communicated to Mr. E. Rollins Morse; that under the assignment he, E. Rollins Morse, was simply a naked trustee, with authority, perhaps, to collect, but that immediately upon collection, at the request of the *cestius que trust*, or their guardian, he would be required to pay it over to them, and that the question was whether it was advisable for him to go through the form of collection, and then turn it over to witness in his position of guardian of the children, or whether he, E. Rollins Morse, would release, abandon any claim under his assignment; that Mr. John T. Morse advised the latter course; he, witness, concurred in it, and the result of that was either this identical letter or a release of all claim under the assignment."

Pages 15, 16.

If Morse, trustee, had collected the money of the company, he would have been bound to pay it to Avery as the guardian of the two daughters. Avery had been appointed their guardian, Dec. 8, 1879 (p. 15). He, Avery, was also administrator (p. 15). There was no intention to affect the daughters' rights, nor could their rights have been affected. It mattered little by what form the money got into Avery's hands. He was both guardian and administrator, and became accountable to the daughters.

k. But it is claimed by Cleary that the assignment to Morse was fraudulent and void as against creditors.

This is denied.

l. There was no evidence in the case that either Morse, or the *cestuis que trust*, the daughters of Ellis, had any knowledge of his, Ellis', financial condition, or that he was insolvent, or that there was any fraudulent purpose or fraudulent intent on his part in making the assignment to Morse.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

m. This was essential to constitute fraud in the assignment.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

Morse swears (p. 12) "*that he did not know the standing of Mr. Ellis, or his reputation for credit in 1877, or along there for some years; that he had no business transactions with him at that time at all.*"

n. A man, though insolvent, may pay a reasonable amount to keep alive policies on his life taken out in his wife's name.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

In McCutcheon's Appeal, 99 Penn. State Rep., 133, the Court say (speaking of a statute of Pennsylvania), that where the policy is taken out for the benefit of the wife, the question of good faith is not open, but where one is assigned, it is open; but that the mere fact that the assured was insolvent at the time of the assignment does not warrant the inference that the assignment was in fraud of creditors, and that it may, notwithstanding, have been made in good faith and without fraud.

Vide also Anderson's Estate, Hay's & Kerr's Appeal, 85 Penn. State Rep., 202.

In the earlier case of Appeal of Elliott's Ex'rs, 50 Penn. State Rep., 75, the policies were assigned by the assured when deeply insolvent, in trust for the benefit of his wife. The policies remained together in the safe of the assured, where they were found after his death. The Court say the assignments did not appear to have been known to the trustee or the *cestuis que trust*. The question arose after the death of the assured, whether the executors should be charged with the proceeds of the policies as part of the estate of the assured. The Court held that the assignments were fraudulent and void against creditors, and that the executors should treat the proceeds as assets of the assured.

o. The policies in question in the present case when they were assigned had no value except their surrender value. If there was any fraud, it could only be to the extent that the creditors were defrauded, and that could not exceed the extent of the value to them; that is, could not exceed the surrender value.

p. If a man can legally, when insolvent, pay premiums to keep alive, for the benefit of his wife, policies on his own life, taken out in the name of his wife, can he not legally assign, for the benefit of his children, policies taken out by him? Will not his assignment of a policy on his life, which has no more value at the time than the surrender value, be protected as much as the payment of premiums to a like amount, on a policy taken out on his life by his wife? Is not one as reasonable, natural, humane, and commendable a provision as the other? Does the fact that it is an *assignment* of a policy make the act more obnoxious than if he had paid money to keep other policies alive for the benefit of his wife or children? One is the assignment for the benefit of his wife and children of an unexecuted contract; the other is a payment of money in premiums to keep alive a like contract for their benefit. If the creditors are wronged, they are wronged as much in one case as in the other.

If when in insolvent circumstances he obtains a policy in a reasonable amount on his life, payable to his wife or children, and the amount of the premium is reasonable, and the transaction is one to be upheld and protected in law, should not a transfer of an existing policy for the benefit of his wife or children be in like manner upheld and protected? Where is the substantial difference? Creditors may be injured in the one case as much as in the other. If there is any loss to the creditors, it is the money paid in one case for premiums,

and in the other (and it may be a smaller sum), the surrender value of the policy, *and that is based on premiums also.*

Whether solvent or insolvent, he is bound by all the laws of humanity to feed and clothe his wife and children in his lifetime; and money used by him for this purpose would never be attacked as fraudulently used. Is it unreasonable, whether solvent or insolvent, that he should in his lifetime make a reasonable provision for them after his death, either by obtaining a policy on his life, payable to them, and paying the premiums on it, or doing substantially the same thing, — assigning an existing policy for their benefit?

A statute of Massachusetts, after providing that "a policy of insurance on the life of a person, expressed to be for the benefit of a married woman, or assigned, transferred, or made payable to a married woman, or to any person in trust for her, or her benefit, whether procured by herself, her husband, or any other person, and whether such transfer be made by her husband or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband, or his creditors, or the person effecting or transferring the same, or his creditors," also provides that "when a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of such other, or his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto, against the creditors and representatives of the person effecting the same. If the premium is paid by a person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of his creditors, subject, however, to the Statute of Limitations."

Pub. Stat. of Mass. (1882), ch. 119, sec. 167.

This has been the law in Massachusetts ever since 1864.

Gen. Stat. of Mass. (1860), ch. 58, sec. 62.

Acts of 1864, ch. 197.

Although the assignment to Morse, trustee, may possibly not bring this case within the strict *letter* of this Massachusetts statute, yet it certainly does bring it within its *spirit* and *substance*. After the assignment, it may be truthfully said that the policy, *by virtue of the assignment*, is to be for the benefit of another, or expressed to be for the benefit of another. If, years after the policy had been issued, the assured had directed the insurance company to insert in it a statement that it was for the benefit of another, specifying whom,

and the company had inserted the same in the policy, the case would have been within the provisions of this statute. It is not necessary that such statement be part and parcel of the policy when first issued. It is certainly difficult to see, as far as creditors or their rights are concerned, any difference in *substance* between a policy obtained by a debtor upon his own life, and expressed on its face to be for the benefit of another, and a policy obtained by such debtor upon his own life, and afterwards assigned to another, or in trust for another. The two transactions come *substantially* to the same thing.

q. An assignee in bankruptcy, who affirms in part a fraudulent transfer by the bankrupt, affirms it *in toto*.

Butler *v.* Hildreth, 5 Metc. (Mass), 49, 51.

He has full power to affirm it, and when once affirmed by him it cannot afterwards be disaffirmed.

Butler *v.* Hildreth, 5 Metc., 49.
Snow *v.* Lang, 2 Allen (Mass.), 18.
Hazelton *v.* Allen, 3 Allen (Mass.), 114.

r. Here the present assignee in bankruptcy affirmed the surrender by Morse, trustee, of the policy No. 68,430.

s. It was that surrender that kept alive the two other policies assigned to the trustee, *and the present assignee in bankruptcy claims all benefits arising from that surrender by claiming the whole proceeds of the policy in this case, and also that portion of the surrender value of policy 68,430 received by Avery and not applied in payment of premiums on the other policies.* Pages 3–7. *Cleary in his declaration nowhere alleges that the surrender was improper. He affirms it in his declaration.* Pages 2, 3.

t. If the act of the trustee in that surrender was a nullity, the policies would have been avoided. If that act was a nullity, the assignee cannot claim that the policies continued in force. If that act was valid, it must be on the ground that the assignment was either valid, or that the assignee has affirmed it. It cannot be valid for one purpose and void for another.

The assignee treats it as valid by claiming that the policy in question here continued in force, and claiming the full amount paid under it; and also that portion of the surrender value of policy 68,430 received by Avery and not applied in payment of premiums

on the other policies. If the jury had found upon the facts the assignment to Morse to have been fraudulent and void, of course then the question whether Morse accepted the trust or knew of the assignment would have become immaterial, because if fraudulent and void, no delivery of the assignment or acceptance of the trust could have cured that defect; but if the jury had found that the assignment was not fraudulent and void, then it would have been material to consider whether the assignment ever became operative or wholly failed; whether a delivery of it or an acceptance of the trust was necessary to make it operative, and what constituted such an acceptance; whether acting under it constituted an acceptance; and whether any disclaimer by Morse could affect the rights of the daughters, or vest the policies in the assignee in bankruptcy, especially in view of the testimony of Avery how and why that disclaimer came to be written.

The ruling asked should have been given.

VII.

Seventh Error Assigned.

"That the Court should have ruled that the assignment in bankruptcy to Bates did not vest in him any interest in the policies, as he had no insurable interest in the life of the bankrupt; and that any assignment of the policies by the assignee or by any other person to one having no insurable interest in the life of the bankrupt would be invalid and convey nothing."

a. An assignment to a person who has no insurable interest in the life of the assured passes nothing.

Warnock *v.* Davis, 104 U.S., 775.
Cammack *v.* Lewis, 15 Wallace, 643.
Basye *v.* Adams, 81 Kentucky, 374, 375.
Missouri Valley L. Ins. Co. *v.* Sturges, 18 Kansas, 93.
Franklin L. Ins. Co. *v.* Hazzard, 41 Indiana, 116.
Same *v.* Sefton, 53 Indiana, 380.

b. An assignee in bankruptcy has no insurable interest in the bankrupt's life. *In re* McKinney, 15 Fed. Rep., 535.

In the case of Warnock *v.* Davis, this Court say, on page 779, "The assignment of a policy to a party not having an insurable interest is as objectionable as taking out a policy in his name."

And it is placed on the ground that it is a wagering transaction, a mere speculation, giving a direct interest in the early termination of the life of the assured, and against public policy.

The ruling asked should have been given.

VIII.

Eighth Error Assigned.

"That the Court should have ruled that if the assignment was made to Morse without any valuable consideration, and Ellis was insolvent at the time when he made it, that would not enable the assignee in bankruptcy to avoid the assignment except to the extent of the value of the policies at the time of the assignment."

a. "What a trustee in bankruptcy does if such a policy comes into his hands, is to see if he can get anything from the insurance office, and all the creditors are deprived of, is the surrender value of the policy."

Per Mellish, L.J., in Holt *v.* Everall, 34 Law Times Reports (N.S.), page 602.

In re McKinney (S. Dist. N.Y.), 15 Fed. Rep., 535.

b. The extent of the rights of the assignee in bankruptcy is the surrender value.

In re McKinney, 15 Fed. Rep., 535.

c. An assignee in bankruptcy is not bound to assume and take upon himself the burden of all the property and contracts the bankrupt may have. Some may be exceedingly burdensome, and a greater detriment than benefit to the bankrupt's estate (*a damnosa hæreditas*).

Robson on Bankruptcy, page 478, 5th ed.

Deacon on Bankruptcy, page 535.

Streeter *v.* Sumner, 31 New Hampshire, 542.

Smith *v.* Gordon, 6 Law Reporter, 313.

Copeland *v.* Stephens, 1 Barn. & Alderson, 593, 604, 607.

Hanson *v.* Stevenson, 1 Barn. & Alderson, 307.

Turner *v.* Richardson, 7 East, 335.

Ex parte Faxon *in re* Laurie, Blood, & Hammond, 1 Lowell Decisions, 404.

Kimberling *v.* Hartly, 1 Fed. Reporter, 574.

d. Leases are often of this character.

e. A life-insurance policy, except to the extent of its surrender value, may be of this character; some have no surrender value.

f. An assignee in bankruptcy has no insurable interest in the life of the bankrupt.

In re McKinney (Southern Dist. N. Y.), 15 Fed. Rep., 535.

g. He has no right to pay the premiums out of the estate to keep it alive, from time to time: his business is to wind up and distribute.

In re McKinney (Southern Dist. N. Y.), 15 Fed. Rep., 535.

h. Bates, the first assignee, had this view, and he never meant to assert any ownership over any policy on Ellis' life.

i. There are certain contracts which do not pass to an assignee in bankruptcy.

j. A contract for personal services of the bankrupt would not pass to an assignee in bankruptcy, except to the extent of wages earned prior to the adjudication.

Streeter *v*. Sumner, 31 New Hamp., 542.

Under the old bankrupt law in England, all present, as well as future, property of the bankrupt acquired prior to his obtaining a certificate of discharge passed to his assignee.

13 Elizabeth, ch. 7, sec. 11; 4 Stat. at Large, page 302.

6 George IV., ch. 16, secs. 63 and 64; 43 Stat. at Large, page 66.

1 & 2 William IV., ch. 56, sec. 25; 50 Stat. at Large, page 370.

Robson on Bankruptcy, pages 442, 443, 5th ed.

Willes, J., in Kitson *v*. Hardwick, 7 Law Rep. (Com. Pleas), 479.

Troughton *v*. Gitley, 2 Ambler Rep., 630.

Everett *v*. Backhouse, 10 Vesey, 94.

By the English Act of 1869, the property acquired by a bankrupt

after the bankruptcy has been closed does not pass to the assignee, although the bankrupt does not get his discharge.

In re Pettit's Estate, 1 Law Rep. (Ch'y Division), 478.
32 & 33 Victoria, ch. 71, sec. 15; 90 Stat. at Large, page 281.

But even under the old English bankrupt law, wages for personal labor, earned *after* the adjudication, did not pass to the assignee.

Chippendall *v.* Tomlinson, 4 Douglas, 318.
Silk *v.* Osborn, 1 Espinasse, 140.
Williams *v.* Chambers, 10 Queen's Bench, 337.
Ex parte Walters, 2 Montagu, Deacon, & De Gex, 635.
Ex parte Grimstead, De Gex, 78.
Ex parte Vine *in re* Wilson, 8 Law Rep. (Ch'y Division), 366.

In a leading case where there had been *before* the adjudication a breach of a contract for the personal services of the bankrupt, and the contract provided a certain sum as damages, it was held that the cause of action did pass to the assignee.

Drake *v.* Beckham, 11 Meeson & Welsby, 315.
Same case, 2 House of Lords Cases, 579.

Parke, B., on page 625, in the case in the Lords, says: "This contract, if unexecuted, would clearly not have passed to the assignee."

Lord Campbell in same, page 643.

Right of action cannot be made to pass to an assignee in bankruptcy in respect to contracts uncompleted at the time of bankruptcy, by their adoption and completion, where the personal service of the bankrupt himself is of the essence of the contract.

Erle, Wilde, & Cresswell in Beckham *v.* Drake, 2 House of Lords Cases, pages 604, 633, 615, 616.

Baron Rolfe, page 620 in same, says: "They do not take, so to say, the person of the bankrupt, and so neither can they maintain actions whereby his person is to be compensated for injuries it may have sustained."

k. No claim for damages for injury done to the bankrupt's body,

or mental suffering caused to him, did pass, although the claim arose before the adjudication. The claim to pass must have been one relating to property.

Howard *v.* Crowther, 8 Meeson & Welsby, 601.
Drake *v.* Beckham, { 11 Meeson & Welsby, 315. / 2 House of Lords Cases, 579.
Rogers *v.* Spence, 13 Meeson & Welsby, 571.
Same in Lords, 12 Clark & Finnelly, 700.
Brewer *v.* Dew, 11 Meeson & Welsby, 625.
Wetherell *v.* Julius, 10 Common Bench, 267.
Stone *v.* Boston & Maine Railroad, 7 Gray, 539.
Ex parte Vine, 8 Law Rep. (Ch'y Division), 364.

l. Would a policy against accident or sickness pass to an assignee except to the extent of its value at the time of the bankruptcy?

Suppose under an accident policy an accident occurred, or under a health policy sickness occurred, after the adjudication, would the assignee in bankruptcy be entitled to recover the damage or compensation?

The injury is to the person, in which the assignee has no interest.

m. And in case of a life policy, the contingency which makes the amount payable is the termination of that in which the assignee has no interest; viz., the life of the bankrupt.

Neither his life nor his body pass to the assignee in case of bankruptcy.

His right to his own life and to insure it is as much and as purely personal as his right to be protected and insured against accidents or sickness, or to earn a livelihood by his own personal labor.

n. If a policy of life insurance can ever pass to an assignee in bankruptcy, it must be only to the extent of enabling him to collect its surrender value.

It has no market value.

The assignee cannot sell or assign it.

An assignment of it to a person having no insurable interest in the life of the assured passes nothing.

The assignee cannot pay premiums out of the estate to keep it alive.

What then is the extent of his interest in such policy? Merely to surrender it and receive its surrender value.

o. If the creditors have been defrauded by a fraudulent assign-

ment of it by the debtor, to what extent have they been injured? Only to the extent of the value of the contract, and that is its surrender value, nothing more.

Suppose Ellis had not gone into bankruptcy, and a creditor, on the ground that it had been fraudulently assigned, had sought to reach the policy and have it applied to the payment of the debt, what would or could a court have done, had it given the relief asked? It could not have ordered the policy to be sold, as its sale or assignment to a person having no insurable interest would have passed nothing. All that a court could have done under these circumstances would have been to pass an order that it be surrendered to the insurance company for its surrender value, and such value applied towards the payment of the debt.

In Anthracite Ins. Co. *v.* Sears, 109 Mass., 383, a creditor by bill in equity against the debtor, and an insurance company insuring his life, sought to reach the policy on his life. The Court in giving its opinion say, " If it is necessary to ascertain the value of the policy, that can easily be done by a master or otherwise."

p. The only interest that an assignee in bankruptcy has in the money paid on a policy on the life of the bankrupt issued to the bankrupt, where the bankrupt dies after the institution of proceedings in bankruptcy, is the surrender value of the policy.

In re McKinney, 15 Fed. Rep., 535.
Vide also the remarks of Mellish, L.J., in Holt *v.* Everall, 34 Law Times Reports (N.S.), page 602.

In the McKinney case, the wife of the bankrupt, after his bankruptcy, supposing, but erroneously, that the policy was for her benefit, had paid the premiums, and kept it alive. Upon his death the insurance company were ready to pay the money, and the question was as to the extent of the interest of the assignee in bankruptcy, and the Court held that the extent of the assignee's interest was the *surrender value.*

Where a wife, possessed of separate estate, procured a policy of insurance upon her own life, payable upon her death to her husband, and paid the premium out of her own estate for a year, before the end of which he was adjudged a bankrupt, and she after the adjudication paid out of her own estate the premiums for the two following years, and before the fourth premium became due she died,

held that the husband was, as against his assignee in bankruptcy, entitled to the proceeds of the policy.

In re Owen & Murrin (Dillon, J.), 8 Nat. Bank Reg., 6.

A creditor proving a debt in bankruptcy, where the creditor holds as collateral security for the payment of the debt a policy of insurance on the life of the bankrupt taken out by the bankrupt and payable to the creditor, is required to deduct only the *surrender value of the policy.*

In re Newland (Southern Dist. N. Y.), 7 Nat. Bank Reg., 477.

A creditor held as security a policy obtained by the debtor. The debtor made an assignment for the benefit of his creditors, which provided that dividends should be paid on debts after deducting the security. No deduction was made in the case. The Court say, "The policy at the date of the deed was of no appreciable value, so that no deduction from the amount of the debt could have been made, and there is no evidence of the abandonment of the security."

Parker *v.* Marquis of Anglesea, 25 Law Times Reports (N.S.), 482.

If the assignment for the benefit of a debtor's children of an existing policy is not to be upheld or protected, to what extent is it void against creditors? How much have they been damaged? Only to the extent of the value at the time, of the thing assigned. What was its value then? Nothing more than its surrender value. It is a peculiar kind of property. It may lapse for non-payment of premiums; the assured may end it at any time by violating its provisions. Creditors have no power to prevent any such violation. The prolongation of the debtor's life is something in which he is interested more than all others. His children also have a direct interest in it; they have an insurable interest in his life sufficient to support a policy taken out in their own names, or in his name payable to them, or to support an assignment for their benefit of a policy already taken out by him.

The ruling asked should have been given.

IX.

Ninth Error Assigned.

"That the Court, in case it ruled that the plaintiff was entitled to recover, should have ruled that all that the plaintiff could recover in respect to policy No. 68,428 was the surrender value of it at the time of the filing by said Ellis of his petition in bankruptcy."

The interest of an assignee in bankruptcy is only the surrender value.

In re McKinney and other cases cited *ante*.

Schondler *v.* Wace, 1 Campbell Rep., 487, decided in 1808, seems to be apparently in conflict with the view taken here of the extent of the interest of the assignee in bankruptcy; but it is not in conflict, *as under the English bankrupt law at that time, the assignee was not only entitled to what the bankrupt had at the time of the adjudication, but also to what he acquired afterwards, and before he obtained his certificate of discharge.*

a. The assignee in bankruptcy had no insurable interest in the life of the bankrupt.

In re McKinney, 15 Fed. Rep., 535.

Creditors had an insurable interest, but not the assignee in bankruptcy. Their insurable interest was only to the extent of their debt.

b. He had no right to pay out of the estate any moneys to keep the policy alive.

In re McKinney, 15 Fed. Rep., 535.

All he can do with a policy is to surrender it and get its surrender value.

A debtor's assignment of a policy of insurance upon his life to trustees for the benefit of his creditors contained a covenant that he would pay the premiums, and if he did not, that he would pay what should be paid as such premiums; also that he would do no act by which the policy should be forfeited. He did not pay the premiums, and went to Canada, by which the policy was forfeited. In a suit for breach of contract it was held that the amount of premiums paid

by the trustee could be recovered, and also the present value of the policy, but not the whole amount of the policy.

Hawkins *v.* Coulthurst, 117 Eng. Com. Law Rep. (5 Best and Smith, Q. B.), 343.

Pledgee of a life policy surrendered it without right, and took out a new policy for paid-up value, and that was surrendered and old policy attempted to be reinstated. Trover for conversion by the pledgor, the assured. The jury found a special verdict that the amount of the debt was a given sum, $2,820.67; the market value of the policy a certain sum, viz., $4,908; and that the plaintiff had sustained special damages by the surrender to the amount of $150. The Court held that the plaintiff was entitled to recover the difference between the amount found as his special damage increased by the market value of the policy as found by the jury, and the amount due on the debt.

Wheeler *v.* Pereles, 43 Wisconsin, 332.

Bill in equity against Life Insurance Company; also two actions at law against Life Insurance Company to recover the amount insured. In each case the assured had died. The Civil War between the North and South prevented the payment of premiums. A majority of this Court held that the amount insured could not be recovered, as the policies were avoided by the non-payment of the premiums, and as the war did not excuse the non-payment, but that the equitable value of the policies at the date of the first default could be recovered.

New York Life Ins. Co. *v.* Statham,
Same *v.* Seyms,
Manhattan Life Ins. Co. *v* Buck,
} 93 U. S., 24.

A life insurance company insured a citizen of Virginia, and after receiving the premiums for a number of years, in May, 1861, refused to take any further premiums. It was held on the death of the assured that an action would lie on behalf of the beneficiary for dissolving its contract by such refusal, and that the measure of damages in an action brought for breach, in not performing its contract, was the value of the policy at the time when the contract was dissolved.

Smith *v.* Charter Oak Life Ins. Co., 64 Missouri, 330.

Suppose the assignee in bankruptcy, before Ellis' death, had sued in trover for the conversion of the policy, — the measure of damages clearly would have been only the surrender value.

Suppose the assignee before Ellis' death had waived the alleged conversion and sued in *assumpsit* for the value of the contract, — the measure of damages clearly would have been only the surrender value.

Does the occurrence of an event long after the bankruptcy, to wit, the death of Ellis, in which the assignee had no interest, and which event alone gave an increased value to the policy, alter the measure of the assignee's rights?

Suppose the assignee in bankruptcy, after he had been appointed, had brought a bill in equity against Morse, trustee, and the daughters, for the surrender of the policy, and the defendants in that suit for any reason, either because Ellis' health had become so impaired that a new policy could not be obtained upon his life, or for any other reason had offered to pay the assignee in bankruptcy the surrender value of the policy, would not the Court, upon payment by Morse, trustee, or the daughters, of that sum, have protected their rights in the policy and required the assignee in bankruptcy to release his rights?

If, upon the election of Bates, assignee, all the parties had surrendered to him the policy, all he could have obtained for it was its surrender value. *Could he ask, or can his successor, Cleary, ask, to be put in any better position than he would have been under those circumstances? Is the bankrupt's estate to be made more than whole? If the bankrupt's estate was wronged, is that wrong to be more than righted?*

Suppose the policy had been an accident policy, or one against sickness, and the accident or sickness had occurred after the adjudication, could the assignee in bankruptcy have recovered the damages or compensation payable under the policy? Would not a policy on the life of the bankrupt, except as to its surrender value, be as purely *personal* as one against *accident or sickness?* In the one case the *damage to the body or the disability of the body to labor would be the ground of payment by the insurance company; in the other, the destruction of the body by death.*

Cleary alleges in his declaration (page 3), that said policy, numbered 68,430, was by said Ellis surrendered to said insurance company, March 2, 1879, and a portion of the surrender value

applied in payment of the annual premium due upon policy numbered 68,428. *Cleary makes no claim in his declaration that it was improperly surrendered.* If the policy was illegally surrendered, then No. 68,428 lapsed for non-payment of premium, except to the extent of its surrender value, and that was its only value. But Cleary does not claim that it was illegally surrendered. If he affirms the surrender by Morse, trustee, then does he not recognize his title as trustee, and his act in surrendering it as rightful? and can he affirm Morse's title in part and repudiate it in part?

The ruling asked should have been given.

X.

Tenth Error Assigned.

That the Court ruled to the jury that Cleary was entitled to recover the amount claimed by him, and directed the jury to return a verdict accordingly.

Cleary was not entitled to maintain his suit upon his declaration even for the surrender value. He misapprehended his remedy — if he had any. He was not entitled to recover upon the special count or upon the count for money had and received.

His proper remedy, if he had any, was either in tort for the conversion of the policy or in contract for its surrender value. And this action is not for either. It is in contract for the entire amount paid.

Upon his declaration as framed, he was not entitled to recover the surrender value of the policy. It is not framed with any reference to the surrender value.

But if the declaration in this case is not defective, then the question is whether the case was one in which the Court should have directed a verdict for Cleary for the full amount claimed by him.

We have already claimed that under no circumstances, even if he was entitled to recover, could he recover in respect to policy No. 68,428 more than the surrender value, and reference is made to the argument on that point, to show that the amount for which the verdict was directed was erroneous. It was agreed at the trial that the surrender value of that policy was $1,200. (Page 17.) But no direction to render a verdict for Cleary for any amount should have been given.

The Statute of Limitations of the State and also that contained in the bankrupt laws were a bar to Cleary's recovery.

There were questions of fact as to Bates' knowledge or means of knowledge, and any concealment which should have been submitted to the jury.

The assignment to Morse, trustee, was valid. There was no evidence that Morse or either of the daughters knew of Ellis' financial condition, or knew that he intended any fraud upon his creditors. To defeat the assignment on the ground that he was insolvent, it must also be shown that Morse, trustee, and the daughters, knew of his condition and knew of the fraud.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

Certainly, at least, this question should have been submitted to the jury.

The assignment to Morse, trustee, was an operative assignment. He did act as trustee. There is no doubt that he had it at some time in his possession and did act under it; it was in the hands of the insurance company when Ellis died.

If Morse never had the assignment in his possession, or if he had declined to act under it, it would nevertheless have been valid and been upheld.

Adams *v.* Adams, 21 Wallace, 185.
Way's Settlement, 10 Jurist. (N.S.), page 1166.
Perry on Trusts, secs. 38, 45.
2 Story Eq. Jurisprudence, sec. 976.

But even if the question of delivery or acceptance of the trust was material, it should have been submitted to the jury.

The present assignee in bankruptcy, by his claim in this case, has affirmed the assignment to Morse, trustee.

Morse could not disclaim so as to affect the rights of the *cestuis que trust*, the daughters.

His disclaimer could not have the effect to vest the policy in the assignee in bankruptcy.

The Court could not properly direct a verdict for Cleary because the assignee in bankruptcy had no insurable interest in Ellis' life, and for that reason an assignment of the policy could not have been made to him, except possibly to the extent merely of its surrender value.

It is only in cases where the facts are clear and not in dispute that the Court can direct the jury to render a verdict.

Richardson *v.* City of Boston, 19 Howard, 263.
Hickman *v.* Jones, 9 Wallace, 197, 201.
Bevans *v.* United States, 13 Wallace, 57.
Klein *v.* Russell, 19 Wallace, 433.
Moulor *v.* Ins. Co., 101 U. S., 708.
Manchester *v.* Ericsson, 105 U. S., 347.
Phœnix Ins. Co. *v.* Doster, 106 U. S., 30.
Conn. Mut. L. Ins. Co. *v.* Lathrop, 111 U. S., 612.
Orleans *v.* Platt, 99 U. S., 676.
Randall *v.* Balt. & Ohio R.R. Co., 109 U. S., 478.
National Bank *v.* Ins. Co., 103 U. S., 783.
Schofield *v.* Chicago & St. Paul R.R., 114 U. S., 615.

It was error for the Court to direct the jury to render the verdict. The plaintiff in error in conclusion prays that the judgment be reversed.

JOSHUA D. BALL,
EDWARD AVERY,
For Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
DEC 7 1889
JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

No. 162. **October Term, 1889.**

EDWARD AVERY,

Administrator of MATTHIAS ELLIS, deceased,
Plaintiff in Error,

v.

WILLIAM W. CLEARY,

Assignee in Bankruptcy of MATTHIAS ELLIS.

Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR DEFENDANT IN ERROR.

NATHAN MORSE,
E. M. JOHNSON,
Defendant's Attorneys.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL, 39 ARCH STREET.
1889.

Supreme Court of the United States.

No. 162. October Term, 1889.

EDWARD AVERY, Administrator of MATTHIAS ELLIS, deceased, Plaintiff in Error,

v.

WILLIAM W. CLEARY, Assignee in Bankruptcy of MATTHIAS ELLIS.

Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This is an action of contract, brought by the assignee in bankruptcy of Matthias Ellis, late of Carver, Mass., against Edward Avery, the administrator of the estate of said Ellis, to recover the amount received by him, in his capacity of administrator, from the Connecticut Mutual Life Insurance Company, of Hartford, Conn., as the proceeds of two policies of insurance upon the life of said Ellis, numbered 68428 and 68430. The writ was dated Sept. 30, 1882, and entered at the October term, 1882. The answer is a general denial, and also sets up (1) that the cause of action did not accrue to the assignee within two years before the sueing out of the plaintiff's writ; (2) that the cause of action did not accrue against the defendant in his capacity as administrator of the estate of said Ellis within two

years before the sueing out of the plaintiff's writ. Issue being joined, the case was tried before Carpenter, Judge, and a jury, and a verdict was returned in favor of the plaintiff in the sum of $11,539.56, on Jan. 7, 1886, and the defendant alleged exceptions which were duly allowed.

Statement of Facts.

Matthias Ellis filed his petition in bankruptcy in the District Court of the United States for the District of Kentucky on July 3, 1878. Horace W. Bates was duly elected assignee, and an assignment was made to him of Ellis' property and estate, Aug. 6, 1878.

On June 9, 1882, the present defendant in error, William W. Cleary, was duly appointed as assignee in bankruptcy in place of said Bates, resigned. No reference was made anywhere in said Ellis' schedules in bankruptcy to any policies of insurance (Record, p. 6), and said Bates testified that no assets of value came to his hands as assignee, and none were disclosed to him as being the property of Ellis, and Ellis gave him no information as assignee as to having any insurance, and that he had made no assignment, transfer, or release of any assets; that the first information he had of the existence of any policies in which said Ellis had any interest was some months after the death of said Ellis. (Record, p. 8.) It appears, from the testimony of Joseph Pratt, a brother-in-law of Ellis, that he first wrote to Bates in relation to Ellis' life insurance policies after March 17, 1882. (Record, p. 15.)

On March 2, 1867, the Connecticut Mutual Life Insurance Company issued three policies to said Ellis upon his own life, numbered 68428 and 68429, for $10,000 each, and 68430, for $5,000.

After Ellis' death a paper was found in the possession of the life insurance company purporting to be an assignment of the three policies to E. Rollins Morse, of Boston, in trust for the benefit of the two daughters of said Ellis; this assignment was dated May 19, 1877. (Exhibit B, Record, p. 21.) But said

Morse testified that he did not think that he had ever had in his possession, or seen or handled, a paper purporting to be an assignment of these policies of insurance in the Connecticut Mutual Life Insurance Company on the life of Matthias Ellis; that the first time he knew or had reason to believe such a paper was in existence was when he was called upon by the treasurer of the Ellis Foundry Company (the defendant in No. 160 in this court), who said the company declined to pay him the money on the policy that had been assigned to him unless he (Morse) stated that he had no claim under that policy. (Record, pp. 10, 11.)

Morse subsequently wrote a letter to the life insurance company, stating that he found no assignment to him of policies Nos. 68428 and 68429, on the life of Matthias Ellis, and he did not claim any interest in the same. (Exhibit D, Record, p. 22.)

Policy No. 68430 was surrendered to the company March 2, 1878, for its value, to apply in payment of premiums on policies Nos. 68428 and 68429. (Exhibit C, Record, p. 22.)

Ellis' death occurred Nov. 21, 1879, and the insurance company paid to said Avery, after the receipt of the letter from said Morse (Exhibit D), the sum of $9,390.43 on policy No. 68428, and $258.21 on policy No. 68430 (being the unapplied balance of the surrender value thereof), and said Avery, on Dec. 31, 1879, receipted to said insurance company, as administrator of said Ellis, for those sums.

It appeared that said Ellis was heavily indebted to various persons at, and for a long time before, the date of the pretended assignment to Morse, as trustee (Record, pp. 14 and 15), and that the policy No. 68428 was brought to the defendant by Mr. Pratt (the brother-in-law of Ellis), after his (defendant's) appointment as administrator of Ellis' estate. (Record, p. 16.)

The defendant was appointed administrator of the estate of said Ellis, and also guardian of his two daughters, on Dec. 8, 1879, and gave due notice of his appointment as administrator; and in the inventory of the estate of said Ellis he included "proceeds of life insurance. Cash on deposit, $13,157.43." (Record, p. 10, top.)

Brief of Argument.

1. The first error assigned by the plaintiffs in error is —

"That the Court should have ruled that this action was barred by the State Statute of Limitation, being §§ 3 and 14 of Chapter 197 of the Public Statutes of Massachusetts (not having been commenced within two years from the time the cause of action accrued), unless the defendant fraudulently concealed the cause of action from the knowledge of Bates, the first assignee."

Section 3 of Chapter 197 of Public Statutes of Massachusetts, is as follows: —

"Action for assault and battery, for false imprisonment, for slanderous words, and for libels, and actions for the taking or conversion of personal property, brought against executors, administrators, guardians, trustees, sheriffs, deputy sheriffs, constables, and assignees in insolvency, shall be commenced within two years next after the cause of action accrues, and not afterwards."

Section 14, "If a person liable to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action."

This ruling was rightly refused by the Court below.

The limitation of § 3. applies to actions "for the *taking and conversion of personal property*," alone. This action is brought in contract to recover for money received by the defendant to the plaintiff's use.

"Actions of contract founded on contracts or liabilities not under seal, express or implied," . . . "shall be commenced within six years next after the cause of action accrues, and not afterwards."

Pub. Stat. Mass., Ch. 197, §1.

The provisions of § 3, cannot be extended to include actions of contract for money had and received, which are expressly provided for by another section of the same chapter.

II.

The second error assigned is—

"That the Court should have ruled that this action was barred under the provisions of § 9 of Chapter 136 of the Public Statutes of Massachusetts, not having been commenced within two years from the time defendant gave bond for the discharge of his trust as administrator whereas the Court refused so to rule."

This ruling was rightly refused by the Court.

Section 9 of Chapter 136 of the Public Statutes of Massachusetts reads as follows: —

"No executor or administrator, after having given due notice of his appointment, shall be held to answer *to the suit of a creditor of the deceased*, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust."

The plaintiff is assignee in bankruptcy of the estate of Ellis, *and not a creditor* of Ellis.

The defendant collected the money on the policies as administrator, and the suit may be maintained against him as administrator, because he so collected it, but he is personally liable for it, and the plaintiff may, if he so elect, take judgment and execution against him *de bonis propiis*.

Burgess *v.* Keyes, 108 Mass., 43.

The proceeds of these policies were not assets in the hands of the administrator, liable to the payment of debts or to distribution under the law of the domicil.

The plaintiff does not claim as a creditor, but as the party legally entitled to the specific sum wrongfully held by the administrator, which he was bound to immediately pay over to the assignee in bankruptcy.

The policies of insurance were in the possession of Ellis at the time of his death, but they belonged to his assignee in bankruptcy, and not to Ellis; they can be clearly traced and distinguished from Ellis' own property, if any, in the hands of the administrator.

Trecothick *v.* Austin, 4 Mason, 16.
Johnson *v.* Ames, 11 Pick., 173.
Harlow *v.* Dehon, 111 Mass., 195.
Simmons *v.* Almy, 100 Mass., 239.
Bancroft *v.* Consen, 13 Allen, 50.
Nat. Bank of Troy *v.* Stanton, 116 Mass., 435, 439.

If the policies were the property of the assignee in bankruptcy, then the proceeds of those policies when collected were also the property of the assignee in bankruptcy, and the administrator retained it without right, and the statute does not apply.

Burgess *v.* Keyes, *supra.*

III.

The third error assigned is —

"That the Court should have ruled that this action was barred by the provisions of § 5057 of the Revised Statutes of the United States (being the limitation of two years contained in the bankrupt law of the United States, unless the defendant fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of the defendant to disclose to Bates, the assignee, the facts, would not amount to a fraudulent concealment."

The Court was right in refusing to give this ruling.

Section 5057 of the Revised Statutes of the United States provides that no suit at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a *person claiming an adverse interest* touching any property or rights of property transferrable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against said assignee.

It has been expressly held that this section has no application to a suit against the bankrupt.

Clark *v.* Clark, 17 How., 315.
Phelps *v.* McDonald, 9 Otto, 298.
Re Conant, 5 Blatch., 54.
French *v.* Merrill, 132 Mass., 525.
Minot *v.* Tappan, 127 Mass., 339.

Nor does it affect the right of the assignee to demand and receive from the bankrupt that which belongs to him by virtue of the assignment.

The administrator takes no greater right in the property than the bankrupt had at his death; his duty was to deliver it to the assignee; he is not "a claimant other than the bankrupt," in whose favor the statute runs.

IV.

The fourth assignment of error is —

"That the Court should have ruled that mere ignorance on the part of the assignee in bankruptcy of the cause of action would not take the case out of the Statute of Limitations." Whereas the Court refused so to rule.

This ruling was rightly refused by the Court.

The evidence in the case showed that the policies were omitted from the schedules. This was a concealment of the property by the bankrupt.

Re Goodridge, 2 B. R., 105.
Re Rathbone, 2 B. R., 89.
Re Hussman, 2 B. R., 140.

The evidence shows not a case of mere ignorance on the part of the assignee in bankruptcy, but a fraudulent concealment of property by the bankrupt.

2. The instruction asked, was not called for by the facts of the case.

Dwyer *v.* Dunbar, 5 Wall., 318.

V.

The fifth assignment of Error is —

"That the Court should have ruled that, if the assignee in bankruptcy had the means of ascertaining the facts, and he, through neglect or negligence on his part, omitted to avail himself of these means, it was the same thing as if he had knowledge of the facts; whereas the Court refused so to rule."

This ruling was rightly refused.

1. There was no evidence of negligence on the part of the assignee. He asked the bankrupt directly if there was any property, and was told that there was none. (Record, p. 8.)

2. The neglect of the assignee, even if there was any evidence of neglect, would not be a defence to this action.

Both the bankrupt and his administrator owed the assignee in bankruptcy the duty of surrendering these policies, and neither could take advantage of their neglect to inform the assignee, nor acquire any title from the ignorance or neglect of the true owner to discover the existence of facts which it was their duty to disclose.

3. The legal title was in the assignee in bankruptcy; and the possession of the policy by Ellis, or by the administrator, gave them no more title than if the assignee in bankruptcy had lost the policy and they were mere finders.

Gay *v.* Kingsley, 11 Allen, 345.

VI.

The sixth assignment of error is —

"That the Court should have ruled that if E. Rollins Morse received the assignment made by Ellis to him of the three policies Nos. 68428, 68429, and 68430, without objection at the time to acting as trustee under the assignment, this would constitute an acceptance by him of the office of trustee under the assignment; that if he received the assignment, and acted in any way as trustee under it, he must be held to have accepted the office of trustee under it; and that had he declined or refused to accept the

trusteeship under the said assignment, the trust created by it for the benefit of the daughters would not thereby have been defeated or have failed; that said Morse could not after the death of Ellis, by refusing to claim or by disclaiming any interest in the policies, affect the rights of the daughters under the trust created for their benefit, and that his letter of Dec. 29, 1879, to the president of the insurance company could not vest the policies in the assignee in bankruptcy; whereas the Court so refused to rule."

This request was rightly refused.

1. There was no evidence that Morse ever had, or saw, or knew of the assignment (Exhibit B) before Ellis' death, or that he knowingly did anything thereunder or agreed to act as trustee under that assignment, or that he derived title by virtue of any directions from said Ellis.

It is evident that Morse never had any possession either of the policies or of this assignment.

Ellis never regarded Morse as having a title to the policies, since, after bankruptcy, he assigns one of them to another party. (See record in Case No. 160, Cleary, assignee, *v.* Ellis Foundry Co.)

Neither Morse, the trustee, nor Ellis, the party creating the trust, nor his administrator (Avery) after his death, considered the trust as valid.

The papers (Exhibit B) was made by Ellis and sent for record to the insurance company, with the intention of retaining control of the policies, and at the same time preventing them from coming to the hands of his creditors, and he never informed Morse that he had conveyed these policies to him as trustee, nor obtained his consent, to act as trustee.

2. The assignee does not claim that the acts of Morse vest the title in him.

The assignment to Morse being voluntary, and made at a time when Ellis was heavily indebted, was fraudulent and void as to creditors, and might have been set aside by the assignee if Morse had claimed any title to the policies, or their proceeds under it.

But upon the evidence it appeared that both Morse and the administrator had elected to treat the paper as a nullity, as it in fact was, and the instruction asked for became immaterial in view of the facts in the case.

No instruction should be given to a jury which assumes as a matter of fact that which is not conceded or established by uncontradicted proof.

Knickerbocker Life In. Co. *v.* Foley, 105 U. S., 350.
Leavenworth Bank *v.* Hunt, 11 Wall., 391.
Washington & G. R. R. Co. *v.* Gladmon, 15 Wall., 401.

3. It is true that Morse signed the receipt of the surrender value of policy No. 68430 (Exhibit C, Record, p. 22); but he had no recollection of the fact, but supposes that he was under the impression that it related to another trust in relation to some other policies on Ellis' life which he did hold. (Record, p. 12.)

But this act, done under a misapprehension, would not be enough to make him a trustee or to give him any title to the policies.

Morse sets up no claim of title to the policies or the proceeds. On the contrary, he expressly disclaims all interest in the same. The administrator, who is also the guardian of Ellis' two daughters, takes the proceeds in his capacity as administrator and not as guardian.

VII.

The seventh assignment of errors is —

"That the Court should have ruled that the assignment to Bates did not vest in him any interest in the policies, as he had no insurable interest in the life of the bankrupt, and that any assignment of the policies by the assignee, or by any other person to one having no insurable interest in the life of the bankrupt, would be invalid and convey nothing; whereas the Court refused so to rule."

The Court rightly refused this ruling.

The policies in question were on Ellis' own life, and were assets belonging to his estate, and upon his adjudication in bankruptcy passed to his assignee.

Vetterlein *v.* Barnes, 124 U. S., 169.
In re Newland, 7 Ben., 63.
Brigham *v.* Home Life Ins. Co., 131 Mass., 319.

VIII.

The eighth assignment of error is —

"That the Court should have ruled that if the assignment was made to Morse without any valuable consideration, and Ellis was insolvent at the time when he made it, that would not enable the assignee in bankruptcy to avoid the assignment, except to the extent of the value of the policies at the time of the assignment; whereas the Court refused so to rule."

This request was rightly refused by the Court.

If the assignment to Morse was made without any valuable consideration, and Ellis was insolvent at the time when he made it, then the assignment was voidable, and no title passed under it as against the assignee in bankruptcy.

Trust Co. *v.* Sedgwick, 97 U. S., 304.
Hinde *v.* Longworth, 17 Wheat., 199–213.
Wolcott *v.* Almy, 6 McLean, 23.
Rundle *v.* Murgatroyd, 4 Dall., 304.
Parish *v.* Murphree, 13 How., 92.

2. The assignment passed to the assignee all benefit and all possibilities of benefit under the policies as part of the effects of the bankrupt.

Schondler *v.* Wace, 1 Camp., 487.

3. The ruling was not called for by any facts in the case.

IX.

The ninth assignment of error is —

"That the Court, in case it ruled that the plaintiff was entitled to recover, should have ruled that all the plaintiff could re-

cover, in respect to Policy No. 68428, was the surrender value of it at the time of the filing by said Ellis of his petition in bankruptcy; whereas the Court refused to rule that the plaintiff's right of recovery was so limited."

The ruling was rightly refused by the Court.

1. The policy passed to the assignee under the assignment.

Vetterlein *v.* Barnes, 124 U. S., 169.
Bunyon on Life Ins., 2d Ed., 211.
Brigham *v.* Home Life Ins. Co., 131 Mass., 319.
Schondler *v.* Wace, 1 Camp., 487.

2. The proceeds of the policy were not general assets in the hands of the administrator liable to the payment of debts or to distribution; it was held by him in trust for the benefit and to be paid to the person legally entitled to it.

Gould *v.* Emerson, 99 Mass., 154.

X.

The tenth assignment of error is —

"That the Court ruled to the jury that the plaintiff was entitled to recover the amount claimed by him, viz., the several sums of ninety-three hundred and ninety dollars and forty-three cents, and two hundred and fifty-eight dollars and twenty-one cents, and interest on each from the date of the writ, and directed the jury to render a verdict for the plaintiff accordingly; whereas such ruling and direction should not have been given."

This ruling of the Court was correct.

No evidence was offered by the defendant which raised any issue of fact for the jury.

The defendant had received the proceeds of the policies of insurance as administrator of Ellis estate, and these proceeds belonged to the assignee in bankruptcy.

The assignment to Morse in trust for the benefit of Ellis' daughters was a voluntary assignment, made at a time when

Ellis was heavily in debt, and no title passed to Morse under such assignment. The right of the assignee to recover the proceeds of the policies was clear and undisputed upon the evidence, and the defendant's requests for rulings having all been properly overruled, as not applicable to the case, or as stating erroneous propositions of law, as applied to the facts, the Court was justified in instructing the jury that upon the evidence they must find for the plaintiff.

N. Pa. R.R. Co. *v.* Commercial Nat. Bank, 123 U. S., 727.

Such instruction is proper, when, if the jury found otherwise, the Court would be justified in setting aside the verdict and granting a new trial, as unsupported by and in hostility to the evidence.

Marshall *v.* Hubbard, 117 U. S., 415.
Montclair *v.* Dana, 107 U. S., 162.
Griggs *v.* Houston, 104 U. S., 553.
Bowditch *v.* Boston, 101 U. S., 16.
Anderson County Com'rs *v.* Beal, 113 U. S., 227, 241.

XI.

It is respectfully submitted that all the rulings and refusals to rule were correct, and that the writ of error should be dismissed with costs.

E. M. JOHNSON,
Of Counsel.